(23,393)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 818.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN, APPELLANT,

vs.

FRANK H. HITCHCOCK, AS POSTMASTER GENERAL OF THE UNITED STATES; GEORGE W. WICKERSHAM, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 19, 1912.

1 *Subpœna.*

The President of the United States of America to Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States, in and for the Southern District of New York, Greeting:

You are hereby commanded that you and each of you personally appear before the Judge of the District Court of the United States of America for the Southern District of New York, in the Second Circuit in Equity, on the first Monday of November, A. D., 1912, wheresoever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court, by The Journal of Commerce & Commercial Bulletin, and to do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the ninth day of October, in the year one thousand nine hundred and Twelve and of the Independence of the United States of America the one hundred and thirty-sixth.

THOMAS ALEXANDER, *Clerk.*

MORRIS & PLANTE, *Sol'rs.*

The defendants are required to enter appearance in the above cause in the Clerk's office of this Court, on or before the first Monday of November, 1912, or the bill will be taken pro confesso against them.

THOMAS ALEXANDER, *Clerk.*

2 *Bill of Complaint.*

District Court of the United States for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Journal of Commerce & Commercial Bulletin, a cor-
3 poration organized and existing under and by virtue of the laws of the State of New York, as the owner and publisher of a newspaper known as The Journal of Commerce & Commercial Bulletin, published in the City of New York and elsewhere, brings this, its bill of complaint, against Frank H. Hitchcock, who is the Postmaster General of the United States of America; George W. Wickersham, who is the Attorney General of the United States of America; Edward M. Morgan, who is the Postmaster of the United States in and for the post office situated in the Borough of Manhattan, in the City of New York, and Henry A. Wise, who is the District Attorney of the United States, for the Southern District of New York, and thereupon your orator alleges and complains and says:

I. That your orator is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and is a citizen of said State, and maintains its principal office and place of business at 32 Broadway, in the Borough of Manhattan, City of New York, and in the Southern District of New York; that your orator was incorporated under the Business Corporation Law of the State of New York on the first day of June, 1893, with an authorized capital stock of $700,000, divided into 7,000 shares of the par value of $100 each, of which 6,000 shares of the par value of $600,000 is common stock and 1,000 shares of the par value of $100,000 is preferred stock, and all of which is now issued and outstanding.

II. That your orator is engaged in the business of publishing a newspaper known as The Journal of Commerce & Commercial Bul-
letin, which newspaper is published daily in the City of New
4 York, Southern District of New York, and elsewhere throughout the United States of America.

That your orator is also engaged in the business of publishing a weekly paper known as "The Review," which paper is published weekly in the City of New York and elsewhere throughout the United States.

III. That your orator has invested in its business of newspaper publishing large sums of money in printing presses, appliances and equipment, and has invested therein large sums of money and cash capital for the establishment and operation of its business, aggregating greatly in excess of the sum of $1,000,000.

IV. That your orator has issued and outstanding mortgage bonds secured by mortgage upon all or some of its said properties and has likewise issued and now has outstanding other obligations and securities.

V. That by reason of complainant's business methods and by reason of the character of said newspaper, such newspaper is well and favorably regarded as a newspaper by the general public in the City of New York and throughout the country, and your orator has acquired for such newspaper a large and extensive circulation and has achieved for said newspaper in the City of New York, a wide and favorable reputation as an advertising medium; that by reason of such reputation complainant has obtained a very valuable and highly profitable business in publishing advertisements in its said newspaper and complainant's business of newspaper publishing depends for its profits very largely upon the revenue derived from its advertising patronage.

5 VI. That your orator in the publishing and circulating of its said newspaper daily sends through the mail many thousands of copies of its said newspaper to the readers thereof and subscribers thereto and others, and pursuant to the postal laws of the United States, has had said newspaper entered at the post office in the Borough of Manhattan, City of New York, as second class mail matter and daily sends said copies of its newspaper to its subscribers and others as mail of the second class within the meaning and operation of the postal laws and of the regulations relating thereto.

That your orator depends and relies upon the mail as a means of so circulating and publishing its newspaper to many of its subscribers and others who daily purchase and read the same and without the use of the mails your orator would be unable to circulate its newspaper and unable to deliver the same to its subscribers and others and to the general public, and would be put to such inconvenience and trouble and caused such delay in the delivery thereof, that said newspapers would not be received by such subscribers and others within a reasonable time after the respective days of the issue thereof, and in fact, would not be received until after such a lapse of time as to make said daily newspapers valueless to the subscribers thereto; that the denial of the use of the mails to your orator for the circulating of its newspaper would result in the entire loss of its subscription list and would result in the loss in the annual sales of many thousands of copies of said newspaper and would cause serious injury to the reputation of the paper, would seriously curtail and hamper its business and increase the expense thereof and the expense of

circulating said paper, all of which would cause a falling off in its advertising patronage and a decrease in the returns thereof,
6 and would cause a loss in the profits of its business and its said business of newspaper publishing would be irreparably impaired and injured.

VII. That the denial of the use of the mail to your orator for the circulating of its newspaper would result in serious inconveniences to thousands of leading business concerns in all parts of the country and in almost every branch of trade, for the reason that the information supplied by your orator is of great importance and to deprive the subscribers to its newspaper and others who daily purchase and read the same of such information, would in numerous cases, cause much loss and injury. The importer and the exporter would be deprived of the information supplied as to inward and outward manifests of vessels, giving details of cargoes brought to and fro; insurance companies would lose the use of the fire record published in the newspaper of your orator, which is conceded to be the most exhaustive compilation of its kind published and is generally considered an important factor in the daily conduct of insurance business; dry goods merchants would be deprived of the daily reports published in the newspaper of your orator; dealers in country produce who contract for their product on a basis of prices quoted in the newspaper published by your orator on the day of delivery, would be thrown into much confusion; wholesale grocers who have for years depended upon the reports and quotations published in the newspaper of your orator on staple products would be seriously embarrassed; purchasers and sellers of iron, steel, copper, lead, etc., would lose the reports upon which they daily depend; bankers and investors who look to the newspaper published by your orator for special information would be deprived of this information and many
7 other lines of trade and commerce, individuals and business houses in all parts of the country, would be deprived of what to them is a positive necessity in the way of information which is now supplied to them by the newspaper published by your orator. That the denial of the privileges of the mail to the newspaper published by your orator would not only inflict an injury upon it, but would also embarrass and deprive the business public of the use of a valuable instrument in their business affairs.

VIII. That said weekly paper "The Review," published by your orator, is a publication devoted to the publication of insurance news and that by reason of your orator's business methods and by reason of the character of said weekly paper, such paper is well and favorably regarded as a newspaper by the general public in the City of New York, and throughout the United States, and your orator has acquired for such paper a large and extensive circulation and has achieved for such paper a wide and favorable reputation as an advertising medium, and has obtained a very valuable and highly profitable business in publishing advertisements therein, and your orator depends very largely for its profits from said paper upon its advertising patronage. That your orator circulates said paper, and weekly sends many copies of said paper to its subscribers, through

the mail, having entered said paper at the Post Office in the Borough of Manhattan, City of New York, as second class mail matter. That the enforcement of the legislative enactment hereinafter set forth and the denial of the use of the mails to your orator will likewise cause great and serious injury to the business of your orator and cause the loss of the entire subscription list of said paper
8 "The Review" and cause great loss in its advertising patronage and your orator would suffer irreparable injury.

IX. That in addition to the newspaper of your orator upwards of 25,000 newspapers, magazines and periodicals are published in and throughout the United States of America, each of which is doing a large and thriving business and together the owners thereof have made investments in the United States of America of cash capital aggregating many millions of dollars and each and all thereof are equally affected by the legislative enactment hereinafter set forth.

X. That the following Act was passed by the Senate and House of Representatives of the United States of America in Congress assembled on or about the 24th day of August, 1912, and became a law of the United States of America on or about said day, with the approval of the President of said United States, to wit:

"(Public No. 336.)

"(H. R. 21279.)

"An Act Making Appropriations for the Service of the Post Office Department for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Thirteen, and for Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows * * *
9 "SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided, further, That it shall not be necessary to include in such statement the names of persons owning less

than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

10 "That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

XI. Your orator represents that said Act and so much thereof as is set out in paragraph "X" hereof, is unconstitutional and void and of no effect whatever; that it violates the Constitution of the United States and particularly the First and Fifth Amendments thereto, for the reason that it deprives your orator of liberty and property without due process of law, deprives your orator of and denies to him the equal protection of the laws and abridges the freedom of the press.

XII. That in and by said law, it is provided that your orator and other newspaper publishers and owners shall file and publish to the world, statements of the circulation of its and their publications, i. e., the average of the number of copies of each issue of such publication sold or distributed to paid subscribers; that your orator has never disclosed the circulation of its said publications to the public or to the officials of the Government of the United States (except in so far as necessary to secure entry of said newspaper and said weekly as second class matter) or to any person or persons other than its officers, directors, stockholders and other persons directly in-

11 terested in its business and entitled by reason of such interests to such information; that your orator does not trade or rely upon its circulation or the number of paid subscribers it has for its papers, in conducting its business or in soliciting advertisements therefor or subscriptions thereto, but the business of your orator has been built up upon the trade name, reputation and character of such newspaper and such weekly and upon the class of news and information published therein, your orator's newspaper being well known and enjoying a high reputation for its publication of news and other matter relating to financial and business affairs and conditions, and its weekly being well known and enjoying a similarly high reputation for its publication of insurance news; that neither the United States of America nor the Post Office Department thereof, nor the officials thereof, nor the public at large, have any interest in knowing or having furnished or published to it or them the circulation of the complainant's publications or the average of the number of paid subscribers to either thereof for the six months preceding the first

day of October, 1912, nor for any other period, nor is said information or a statement thereof material or necessary to aid or assist in the operation of the Post Office Department or in the carrying of the mails or in the regulation thereof, nor does the same have anything to do with or bear any relation to the regulation of the mails or the carrying of mail matter of the second class.

XIII. That in and by said Act and the sections thereof hereinbefore set forth, it is provided that your orator and other newspaper owners and publishers and the owners and publishers of other publications, shall file with the Postmaster General in the Post
12 Office at which the publication of your orator is entered, a statement, not later than the first day of October, 1912, setting forth the post office addresses of the editor and managing editor, publishers, business managers and owners of your orator's papers and in addition the stockholders of your orator and their addresses, and the names and addresses of known bondholders, mortgagees or other security holders, holding or owning bonds, mortgages or other securities and obligations issued by your orator; that your orator has never disclosed the information so called for except the names and addresses of the owner, editor, managing editor, publisher and business manager of its papers, to the Government of the United States or any department thereof, or official therein, or the public at large, but has always treated and regarded the same as private information relating to its own private business affairs and has refused at all times to furnish statements thereof, except to its officers, directors and stockholders and others interested therein and by reason thereof entitled to such information; that neither the giving of such information nor the filing of statements thereof with the Postmaster General or the Postmaster at the Post Office in the City of New York, nor the publication thereof by your orator in its said newspaper orweekly in the second issue of such newspaper or weekly printed next after the filing of such statement, or in any other issue, will be of any material benefit or advantage to the Government or to any department thereof, or official therein, or to the public at large, nor will the same aid or assist in the operation or management of the said Post Office Department or in the regulation of the mails, nor does the
13 same bear any relation to the regulation of the mails or the carrying of mail matter of the second class.

XIV. That in and by the provisions of said Act as hereinbefore set forth, it is provided that all editorial or other reading matter published in the newspaper or weekly of your orator or in any other newspaper, magazine or periodical for the publication of which money or other valuable consideration is paid, accepted or promised, shall be plainly marked "advertisement" and for failure to so mark any such matter for which compensation is paid, accepted or promised, the editors or publishers of your orator's papers, shall, upon conviction, be fined not less than $50 nor more than $500. That your orator does not publish in its said newspaper or weekly any advertisements as editorial or reading matter, but it does publish in its said newspaper reading notices and other reading comment, criticisms or reviews, for which either directly or indirectly some valuable consideration is frequently paid, accepted or promised, and

some or all of which are not marked "advertisement;" that all such matters are matters of business arrangement or of favor or otherwise between your orator and its advertisers, or other person by whom the consideration directly or indirectly is promised or paid, or from whom it is accepted; and said Act in so far as it prohibits the publication of any such matter and provides for penalties for violation by such publication has no relation to the operation or regulation of the mails and such provision of said Act is not necessary or proper to assist the Government of the United States or any department or official thereof to carry out or perform any power or duty entrusted or granted to the United States by the several States under and by the Federal Constitution or otherwise.

14 XV. That in and by said Act and the section thereof hereinbefore set forth, it is the duty of the defendant Hitchcock as such Postmaster General and of the defendant Morgan as Postmaster, to enforce the operation thereof by furnishing blanks for the rendering of the required statements and by sending to your orator and other newspaper owners notices of his or their failure or neglect to comply with the provisions of said section in the respects aforesaid, and to deny to your orator, or to any other newspaper owner the use of the mails at the expiration of ten days after the sending of such notice by registered mail, if such law is not complied with by your orator or other newspaper owners within said ten days, and your orator alleges that the said Hitchcock as Postmaster General and the said Morgan as Postmaster are threatening to and are enforcing said law against your orator and other newspaper owners and publishers, and have sent to your orator blanks for the making of the aforesaid statements and demanded from your orator that it make and file such statements under such law. That your orator has failed and refused to comply with the provisions of said law and the said Hitchcock as Postmaster General and the said Morgan as Postmaster are threatening, and are about to enforce said law against your orator by sending to your orator by registered mail notice of such failure, and by denying to your orator within ten days after the sending of such notice the use of the mails for its newspaper and weekly, or for any other purpose whatsoever, unless within said ten days your orator shall comply with said law.

XVI. That the defendant Wickersham as Attorney General and the defendant Wise as District Attorney are threatening to

15 enforce and are about to enforce the provisions of said Act prohibiting the publication of any editorial or reading matter in your orator's newspaper, for which money or other valuable consideration is paid, accepted or promised without plainly marking the same "advertisement," and the said Wickersham as Attorney General and the said Wise as District Attorney are threatening to and are about to commence, and under and by reason of said Act, it is their duty to commence against your orator criminal prosecution to recover from your orator fines and penalties in accordance with the provisions of said Act, and your orator will thereby be subjected to a multiplicity of suits and prosecutions and its property will be taken and dissipated by fines, and it will suffer irreparable injury.

XVII. That under and by virtue of the Constitution of the United

States, and particularly of the First and Fifth Amendments thereto, your orator is entitled to the free and uninterrupted use of its property without restraint and is entitled to the same use and enjoyment of its property as any other citizen of the United States of America, and to conduct its lawful business and to operate and use its property in connection therewith in such manner as it may see fit; and your orator is entitled to the privileges of the mail and to use the mail in connection with its said business equally with each and every other citizen of the United States of America, provided that in so doing it does not offend against the peace, health, morals or welfare of the community, and is likewise entitled to the privileges of the mail and the use of the mail in connection with the publishing and circulating of its said newspaper and of its said weekly, and any law which denies to your orator the privileges of the mail for its
16 said papers and confiscates the property of your orator by way of fines or penalties solely by reason of its refusal or neglect to disclose to the postal authorities or to the public, its private information regarding its private, financial and business affairs or by reason of its refusal to label "advertisement" certain matters published in its newspaper, such matters being in no wise improper or tending to injuriously affect the health, morals or welfare of the community, deprives your orator of its property without due process of law and discriminates against your orator to the advantage and benefit of other corporations and persons, citizens of the United States of America, and denies to your orator the equal protection of the laws and abridges the freedom of the press, and is in violation of the provisions of the First and Fifth Amendments of the Constitution of the United States, and the aforesaid Act is for the foregoing reasons in violation of said provisions of the First and Fifth Amendments of the Constitution of the United States, and is void.

XVIII. That in and by the First Amendment to the Constitution of the United States each and every citizen is guaranteed liberty of speech and freedom of the press and any law that subjects the editor or publisher of a newspaper to fine or fines for refusal or neglect to plainly mark "advertisement" any or all editorial or other reading matter published in such paper for the publication of which money or other valuable consideration is paid, accepted or promised is an abridgment of the liberty of the press and in violation of the First Amendment to the Constitution of the United States and the aforesaid provisions of said Act are for the foregoing reasons in violation of said provisions of the First Amendment to the Constitution of the United States and are void.

17 XIX. That said Act and particularly so much thereof as prohibits the publication of and provides for fines for the publication of any editorial or other reading matter for which any money or other valuable consideration is paid, accepted or promised without plainly marking the same "advertisement" is void and of no effect, is not within the power of Congress to enact and is an usurpation by Congress of powers expressly reserved to the several States and is legislation affecting matters with which the several States of the United States alone have the right to treat by legislation or otherwise.

XX. That it is absolutely necessary for the reasonable, quiet and proper enjoyment of its property and the carrying on of its business of newspaper publishing, that your orator should be permitted to continue the use of the mails, and that if it be denied the privileges of the mail and the use thereof, its publishing plant and business will be ruined and its property thereby rendered worthless and of no value and irreparable injury will be done to it, and your orator will have, and now has, as it is advised by counsel and avers and claims, no adequate remedy at law, and that as your orator is advised by counsel and avers and claims, there is no remedy except in equity to test adequately and completely the said Act, and that in the absence of such remedy in equity the penalties in said Act would be unreasonable and confiscatory, and would deprive your orator of its liberty and property without due process of law and would likewise deny to it the equal protection of the laws and would abridge the freedom of the press, in contravention of the First and Fifth Amendments of the Constitution of the United States, on which account your orator invokes the jurisdiction of this Court to protect it against the aforesaid threatened invasion by the defendants of its in-
18 herent rights under and guaranteed by the Constitution of the United States.

XXI. That the business of your orator, which will be impaired by the threatened acts of the defendants, as hereinbefore stated, is of very great value, and the value of such business and the property invested by your orator in said newspaper publishing business which will be impaired and destroyed by the threatened acts of the defendants, is upwards of $1,000,000, and the amount involved in this suit is more than $3,000.

To the end, therefore, that your orator may have the relief which it can only obtain in a court of equity, and that the defendants may each answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, who now prays:

1. That it be adjudged and decreed that the sections and provisions of said Act, more fully and at length set forth in paragraph "X" hereof, are illegal and void because beyond the power of Congress to enact and because in contravention of the First and Fifth Amendments to the Constitution of the United States as aforesaid, in that such provisions of said Act deprive your orator of liberty and property without due process of law, deny to your orator the equal protection of the laws, and abridge the freedom of the press.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injuries which would result from the threatened enforcement of such provisions of said Act, and that such injuries would be irreparable.

3. That it be adjudged and decreed that your orator be
19 granted writs issuing out of and under the seal of this Honorable Court against the defendants herein named, restraining them, and each of them, and any and all persons acting through or under them, and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the said Act or any of the provisions thereof

against your orator, and that under the provisions of Section 263 of the Judiciary Law of the United States a restraining order may be granted against the defendants, and each of them, and any and all persons acting through or under them, restraining them likewise until your Honorable Court shall determine upon motion and hearing whether a temporary injunction with the like effect, shall not be granted pendente lite.

4. That your orator further prays that if at any time hereafter prior to the final hearing hereof any other person or persons shall attempt to enforce the provisions of said Act or otherwise act or proceed thereunder such persons, or some of them on behalf of all, be made parties defendant hereto and each of them enjoined and restrained *and* herein prayed, and that your orator have such other and further or different relief as to the Court may seem just and proper and the nature of the case may require.

5. Your orator further prays that your Honors grant your orator a writ of subpœna de respondendum issuing out of and under the seal of this Honorable Court, to be directed to the said defendants commanding them, and each of them, on a certain day and under a certain penalty, to be therein inserted, to appear before your Honors and this Honorable Court and then and there full, true and direct answer make to all and singular the premises (but not under oath), and further stand, do, perform and abide by such further order and decree as to your Honors may seem meet, and also that a writ of provisional injunction to the same purport, tenor and effect as hereinbefore set forth and appears, be granted during the pendency of this action, and your orator will ever pray, &c.

THE JOURNAL OF COMMERCE &
COMMERCIAL BULLETIN,
By ALFRED W. DODSWORTH,
Secretary.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Counsel for Complainant.

THE UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 9th day of October, 1912, before me personally appeared Alfred W. Dodsworth, to me known and known to me to be the Secretary of the above named The Journal of Commerce and Commercial Bulletin, a New York corporation, who made solemn oath that he is the Secretary of such corporation; that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof; and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

ALFRED W. DODSWORTH.

[SEAL.] MARY F. VAUGHEY,
Notary Public, N. Y. County No. 11.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 9, 1912.

21 *Notice of Appearance.*

In the United States District Court for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
vs.
FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York,
Defendants.

To the Clerk of said Court:

Please enter my appearance as solicitor for the defendants Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States, in and for the Southern District of New York, in the above-entitled case

Dated, New York, October 15, 1912.

HENRY A. WISE,
United States Attorney for the Southern District of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 15, 1912.

22

Demurrer.

In the United States District Court for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Complainant,

vs.

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Joint and several demurrers of Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, defendants, to the bill of complaint of the Journal of Commerce & Commercial Bulletin, complainant.

The above-named defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

(1) That the said complainant has not in and by said bill of complaint made or stated such a cause as doth or ought to
23 entitle it to any such relief as is thereby sought and prayed for from or against these defendants;

(2) That the said complainant has not in and by said bill of complaint exhibited such a cause as entitles it in a court of equity to any relief against these defendants, or any of them, as to the matters contained in the said petition, or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, these defendants do demur to the said bill of complaint and to all matters and things therein contained, and pray the judgment of this Honorable Court whether they or any of them shall be compelled to make any further or other answer to the said bill of complaint or any of the matters or things therein

contained, and do further pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

Dated, New York, October 15, 1912.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Solicitor for Defendants.

HENRY A. WISE,
Of Counsel.

24 IN THE STATE OF NEW YORK,
County of New York, ss:

Henry A. Wise, being duly sworn, says, that he is one of the defendants named in the bill of complaint herein, and that the foregoing demurrer is not interposed for the purpose of any delay.

HENRY A. WISE.

Subscribed and sworn to before me this 15 day of October, 1912.

FREDERICK D. CAMPBELL,
Notary Public, Kings Co.

Cert. filed in N. Y. C.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY A. WISE,
Solicitor for Defendants.

25 *Decree.*

In the United States District Court for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
vs.
FRANK H. HITCHCOCK, as Postmaster-General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post-Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

This cause came on to be heard at the October Term of this Court, 1912, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed, that the demurrer to the bill of complaint herein be and the same hereby is sustained, upon the ground that the said complainant has not, in and by the said bill of complaint, made or stated any such cause as does or ought to en-

title it to any such discovery or relief as is thereby sought and prayed for from or against the defendants, or any of them, and that the said bill of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk of this Court.

Dated, this 15 day of October, 1912.

(Sgd.) LEARNED HAND,
Judge of the United States District Court
for the Southern District of New York.

26 *Petition of Appeal.*

In the District Court of the United States for the Southern District of New York. In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant,
against
FRANK H. HITCHCOCK, as Postmaster-General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post-Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

To the Judges of the District Court of the United States for the Southern District of New York:

The above named complainant, considering itself aggrieved by the decree made and entered by the above mentioned Court in the above entitled cause, on the 15th day of October, 1912, wherein and whereby it was ordered, adjudged and decreed that the demurrer to the bill of complaint herein be sustained and this cause be dismissed, does hereby appeal from said order and decree to the United States Supreme Court, for the reasons specified in the assignment of errors which is filed herewith; and complainant prays that this appeal may be allowed, and that a transcript of the record and the proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, October 15th, 1912.

MORRIS & PLANTE,
Solicitors for Complainant.

27 (Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 16, 1912.

28 *Order Allowing Appeal.*

In the District Court of the United States for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Complainant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post-office; and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

On motion of Messrs. Morris & Plante, solicitors for complainant, it is

Ordered that the appeal to the Supreme Court of the United States from the final decree filed and entered herein on the 15th day of October, 1912, be and the same hereby is allowed; and that a certified transcript of the record and all proceedings herein be forthwith transmitted to the said United States Supreme Court at Washington, D. C.; and it is further

Ordered that the bond on appeal be fixed at the sum of $250., the same to act as a supersedeas bond and also as a bond in costs and damages on appeal.

Dated, October 15th, 1912.

LEARNED HAND.
Judge of the District Court of the United States for the Southern District of New York.

29 (Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 16, 1912.

30 *Assignments of Error.*

In the District Court of the United States for the Southern District of New York.

In Equity.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN, Complainant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney-General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post-office; and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Comes now the complainant and files the following assignment of errors, upon which it will rely upon its appeal from the decree made by this Honorable Court on the 15th day of October, 1912, in the above-entitled cause:

First. That the Court erred in sustaining the demurrer interposed by the defendant to the bill of complaint, and holding that the said bill was without equity.

Second. That the Court erred in not decreeing that the following sections and provisions thereof of the Act of Congress of August 24th, 1912, entitled, "An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes", to-wit:

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General
31 and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other

securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement'. Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

were unconstitutional and void, and that said sections and the provisions thereof were violative of Articles I and V of the Amendments to the Constitution of the United States; and that the same were and are illegal and void enactments and beyond the legislative power of Congress.

Third. That the Court erred in not decreeing that the complaint was entitled to the relief prayed for.

Fourth. That the Court erred in dismissing said bill with costs.

32 Wherefore the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such disposition may be made thereof, as in accordance with law and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

Dated, New York, October 15th, 1912.

MORRIS & PLANTE,
Solicitors for Complainant.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 16, 1912.

33 *Bond.*

United States District Court, Southern District of New York.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN, Complainant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants.

Know all men by these presents, that we, The Journal of Commerce and Commercial Bulletin as Principal and the American Bonding Company of Baltimore, a corporation organized under the laws of the State of Maryland, lawfully transacting business and having an office at No. 84 Williams Street, Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney-General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, in the sum of two hundred and fifty ($250) dollars, lawful money of the United States of America, to be paid to the said Frank H. Hitchcock, as Postmaster General of the United States of America, George W. Wickersham, as Attorney-General of the United States of America, Edward M. Morgan, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, their heirs, executors, administrators or assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 16th day of October, 1912.

Whereas, The Journal of Commerce and Commercial Bulletin has appealed to the United States Supreme Court from the decree of the District Court of the United States for the Southern District of New York, bearing date the 15th day of October, 1912, in a suit in which The Journal of Commerce and Commercial Bulletin is Complainant and Frank H. Hitchcock as Postmaster General of the United States of America, George W. Wickersham as Attorney-General of the United States of America, Edward M. Morgan as Postmaster of the United States of America, in and for New York City, Borough of Manhattan, Post Office and Henry A. Wise, as District Attorney of the United States in and for the Southern Dis-

trict of New York, are defendants which said decree sustained the demurrer of the defendants, and

Whereas, the said The Journal of Commerce and Commercial Bulletin desire during the progress of said appeal to stay the execution of the said decree of the said District Court.

34 Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant if the appeal is not sustained and shall abide by and perform whatever decree may be made by the said United States Supreme Court in this case or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall remain in full force and effect.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
By JOHN W. DODSWORTH, *President.*

Attest:

[SEAL.] ALFRED W. DODSWORTH, *Secretary.*

AMERICAN BONDING COMPANY OF BALTIMORE,
By FRANK C. THOMPSON,
Resident Vice-President.

Attest,

[SEAL.] IRA L. ANDERSON,
Resident Assistant Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 16th day of October, 1912, before me personally came John W. Dodsworth, to me known, who being by me duly sworn did depose and say that he resides in the City of New York; that he is the President of The Journal of Commerce and Commercial Bulletin, the corporation described in and which executed the within instrument; that he knew the seal of said corporation, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order. And the said John W. Dodsworth further said that he was acquainted with Alfred W. Dodsworth and knew him to be the secretary of said The Journal of Commerce and Commercial Bulletin; that the signature of said Alfred W. Dodsworth subscribed to the within instrument is the genuine handwriting of the said Alfred W. Dodsworth, and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said John W. Dodsworth.

SAMUEL G. NICHOL,
Notary Public, Kings County, N. Y.

Certificate filed in New York County. Commission expires March 30, 1913.

35

Copy.

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

On Oct. 16, 1912, before me personally came Frank C. Thompson, to me known, who being by me duly sworn, did depose and say that he resides in the City of New York, that he is the Resident Vice-President of the American Bonding Company of Baltimore, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided by law. And the said Frank C. Thompson further said that he was acquainted with Ira L. Anderson and knew him to be the Resident Assistant Secretary of said Company; that the signature of said Resident Assistant Secretary subscribed to the within instrument is the genuine handwriting of the said Resident Assistant Secretary and was subscribed thereto by like order of the Board of Directors, in the presence of him, the said Frank C. Thompson.

[SEAL.] EDWARD F. HEALEY,
Notary Public, New York County.

Cert. filed in New York, Queens, Richmond, Westchester & Nassau Cos.

Extracts from Charter of the American Bonding Company of Baltimore.

Home Office, Baltimore, Md.

"Extract from the Minutes of a Meeting of the Board of Directors of American Bonding Company of Baltimore, Held at the Office of the Company at Baltimore, Maryland, on the 9th Day of July, A. D. 1912.

At a regular meeting of the Board of Directors of the American Bonding Company of Baltimore, held in the office of the Company at Baltimore, Maryland, on the 9th day of July A. D. 1912, the following resolution was adopted:

Resolved, that John A. Griffin, Benj. F. Cator, Norman J. Litts, Jas. T. Wilson and Frank C. Thompson of the City of New York, New York, be and hereby are appointed resident Vice-Presidents of this Company at New York, N. Y., and each of them is hereby authorized and empowered to execute and deliver and attach the seal of the Company to any and all Bonds and Undertakings for and on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust, and guaranteeing the performance of contracts, other than Insurance Policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed or required; such guarantee, bond or undertakings, however, to be attested in

every instance by one of the following named persons: Harry L. Callanan, or Edw. F. Healey or Wallace Stevens or Ira L. Anderson or Raymond Warner or Frank J. Hoey or Rupert Kavanagh who are hereby appointed Resident Assistant Secretaries of this Company at New York City, N. Y., and either of said Resident Assistant Secretaries shall also have the right to attest any hereinbefore mentioned guarantee, bond or undertaking executed on behalf of the Company by the President or by any Vice-President of the Company.

[Printed across face:] Copy.

I, Ira L. Anderson, Resident Assistant Secretary of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true and correct copy of a resolution of the Board of Directors of the American Bonding Company of Baltimore, and is the whole of said resolution.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the American Bonding Company of Baltimore, at the City of New York, N. Y.

Oct. 16, 1912.

[SEAL.]

IRA L. ANDERSON,
Resident Assistant Secretary.

Statement of the Financial Condition of the American Bonding Company of Baltimore at the Close of Business, June 30, 1912.

Assets.

United States Government Bonds		$51,000.00
State and Municipal Bonds		658,403.00
Railroad Bonds		1,104,723.75
Street Railway and Other Bonds		156,392.50
Railroad, Bank and Other Stocks		61,575.00
		$2,032,094.25
Outstanding Premiums, less Commissions		363,522.38
Real Estate		125,646.77
Interest Accrued		15,201.95
Cash in Office and Depositories		316,501.04
		$2,852,966.39

Liabilities.

Legal Reserve		$792,970.55
Reserve for Losses and Contingencies		408,451.07
Reserve for Taxes and Expenses (Payable 1912)		6,416.60
Due for Reinsurance, Return and Advance Premiums		29,318.01
Capital Stock	$750,000.00	
Surplus	765,810.16	
Surplus to Policyholders		1,615,810.16
		$2,852,966.39

[SEAL.]

CITY AND COUNTY OF NEW YORK,
State of New York, ss:

I, Frank C. Thompson, Resident Vice-President of the American Bonding Company of Baltimore, do hereby certify that the foregoing is a true statement of the Assets and Liabilities of said Company at the Close of Business, June 30, 1912.

In testimony whereof, I hereunto set my hand and affix the seal of the Company Oct. 16, 1912.

FRANK C. THOMPSON,
Resident Vice-President.

Subscribed and sworn to before me Oct. 16, 1912.
[SEAL.]
EDWARD F. HEALEY,
Notary Public, New York County.

Cert. filed in New York, Queens, Richmond, Westchester & Nassau Cos.
Copy.

36 The within undertaking is approved as to form and as to the sufficiency of the surety.

LEARNED HAND, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 16, 1912.

37 The President of the United States of America, to Frank H. Hitchcock, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the States; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, within thirty days from the date of this writ, pursuant to an appeal duly allowed by the District Court for the Southern District of New York, on the 15th day of October, 1912, and filed in the Clerk's office of said Court on the 16th day of October, 1912, in a cause wherein The Journal of Commerce & Commercial Bulletin is appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be granted and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 16th day of October, A. D. 1912.

LEARNED HAND,
United States District Judge for the Southern District of New York.

38 [Endorsed:] Eq. 367. Eq. & A. D. 3448. Eq. 367. United States District Court, Southern District of New York. The Journal of Commerce & Commercial Bulletin, Appellant, against Frank H. Hitchcock, as Postmaster, etc., and others, Defendants. (Original.) Citation. Morris & Plante, Solicitors for Appellant, 135 Broadway, New York. U. S. District Court, S. D. of N. Y. Filed Oct. 16, 1912, — M. [Illegible.]

39 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Complainant-Appellant,

vs.

FRANK H. HITCHCOCK, as Postmaster General of the United States of America; George W. Wickersham, as Attorney General of the United States of America; Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Post Office, and Henry A. Wise, as District Attorney of the United States in and for the Southern District of New York, Defendants-Appellees.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this Sixteenth day of October, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the said United States the one hundred and thirty-seventh.

ALEX. GILCHRIST, JR., *Clerk.*

[Seal District Court of the United States, Southern District of N. Y.]

[Endorsed:] Supreme Court of the U. S. The Journal of Commerce & Commercial Bulletin, Complainant-Appellant, vs. Frank H. Hitchcock, as Postmaster General of the United States, et al., Defendants-Appelees. Transcript of Record. Appeal from the District Court of the United States, For the Southern District of New York.

Endorsed on cover: File No. 23,393. S. New York D. C. U. S. Term No. 818. The Journal of Commerce & Commercial Bulletin, appellant, vs. Frank H. Hitchcock, as Postmaster General of the United States; George W. Wickersham, as Attorney General of the United States, et al. Filed October 17th, 1912. File No. 23,393.

6

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America, GEORGE W. WICKERSHAM, as Attorney General of the United States of America, EDWARD M. MORGAN, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and HENRY A. WISE, as District Attorney of the United States, in and for the Southern District of New York,
Appellees.

No. 912.
October Term, 1912.

MOTION TO ADVANCE.

ROBERT C. MORRIS,
GUTHRIE B. PLANTZ,
Of Counsel for Appellant.

C. G. Henderson, 70 to 76 Spring Street, New York.

Supreme Court of the United States.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster General of the United States of America, GEORGE W. WICKERSHAM, as Attorney General of the United States of America, EDWARD M. MORGAN, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and HENRY A. WISE, as District Attorney of the United States, in and for the Southern District of New York,
Appellees.

No. 818.
October Term, 1912.

APPEAL FROM THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE APPEAL.

The appellant above named respectfully moves to advance this cause and to set the same for argument at the earliest date convenient to the Court.

The Solicitor General on behalf of the United States joins in this motion to advance.

The matter involved briefly stated is as follows:

By an Act of Congress of August 24th, 1912, entitled "An Act Making appropriations for the service of the Post Office

Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," it is provided

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and postoffice addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so

marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

The appellant, the publisher of a daily newspaper known as "The Journal of Commerce & Commercial Bulletin" and of a weekly paper known as "The Review," brought this cause in the District Court to have the sections of the law quoted above declared unconstitutional and void, because in violation of Articles I. and V. of the Constitution of the United States, as taking property without due process of law, denying to appellant the equal protection of the law, and abridging the freedom of the press and because the same are illegal and void enactments beyond the power of Congress.

It is contended by appellant that the sections complained of bear no relation to the regulation of the mails, are not designed for the purpose of preventing the sending through the mails of obscene or other objectionable matter injurious to the morals or welfare of the public, but are unreasonable provisions intended to require the owners of the described publications to disclose their private business and financial information to the government and the public not for any proper governmental purpose, but as a matter of general public information.

Likewise it is contended that the law in so far as it dictates to the publisher what shall or shall not be published in his paper, and the form in which certain matters shall be published, abridges the freedom of the press.

That the provision of the law imposing fines for the publication as editorial comment or news of any matter for which any valuable consideration is paid, accepted or promised, without plainly marking the same "advertisement," applies equally whether the publication be sent through the mails or is published and circulated only within the confines of a State without the use of the mail, and that it is, therefore, beyond the power of Congress; that if such acts can be declared a crime and the subject of punishment by fine or other penalty they can only be so declared by the several States.

It is also contended by appellant that to it the use of the mail is a matter of legal and common right; that it is entitled to use the mail in connection with the publication of its said

paper or its other business, equally with every other citizen, and that it cannot be deprived of that right unless the matter sent through the mails and otherwise mailable offends against the peace, health, morals or welfare of the community.

It is set forth in the bill of complaint that appellant, as do other publishers, daily sends through the mail many thousands of copies of its said papers to its subscribers, and that without the use of the mail as a means of so circulating and publishing its newspapers, appellant would be unable to circulate its newspaper and unable to deliver the same to its subscribers and others, and to the general public, and would be put to such inconvenience and trouble and caused such delay in the delivery thereof, that said newspapers would not be received by the subscribers and others within a reasonable time after the respective times of the issue thereof, and, in fact, would not be received until after such a lapse of time as to make said daily newspapers valueless to the subscribers thereto. That the denial, therefore, of the use of the mail to appellant for the circulating of its newspaper and of its weekly, would result in the entire loss of its subscription lists and in the loss in the annual sales of many thousands of copies of such papers, would cause serious injury to the reputation of the papers, seriously curtail and hamper appellant's business and increase the expense thereof and the expense of circulating said paper. This would in turn cause a falling off in its advertising patronage upon which its profits largely depend, and thus cause a loss in the profits of its business, and its business of newspaper publishing would be irreparably impaired and injured.

It is respectfully submitted that a public question of great importance is presented, which vitally affects the owners and publishers of upwards of twenty-five thousand publications, as publishers who refuse or neglect to comply with the sections of the act here questioned will be denied the use of the mail for any purpose whatsoever and will be subjected to multiplicity of prosecutions. They will be without redress if the Court should subsequently determine said enactment to be unconstitutional and void, and likewise appellant in the event of such a decision by this Court would be denied the benefit thereof to which it would be entitled.

The bill of complaint was filed on the 9th day of October, 1912, and the demurrer of the defendants and the decree

thereon, dismissing the bill, were filed October 15th, 1912. Appellant has caused this appeal to be perfected and the return to be filed with the Clerk and the record will be printed in a few days.

Appellant, therefore, respectfully prays this Court to advance this cause for argument, so that the validity of said act may be finally determined by this Court before irreparable injury is done to appellant and other publishers of newspapers, magazines and periodicals.

Dated New York, October 17th, 1912.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 818.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

SUPPLEMENTAL BRIEF OF COUNSEL FOR JOURNAL OF COMMERCE ON CONSTRUCTION OF THE ACT.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Counsel for Appellant.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

CASES AND AUTHORITIES CITED:

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster General of the United States of America, *et al.*,
Appellees.

ARGUMENT UPON THE CONSTRUCTION OF THE ACT OF AUGUST 24th, 1912.

The brief of the Solicitor General contains the wholly unexpected argument that the statute under consideration relates only to *second class* mail matter and should be so construed; that the penalty imposed for failure to file and publish the particular information is not a denial of the privileges of the mail, but a denial of the privileges of the second class mail; and that the penalty for failing to mark paid-for articles "advertisement" can be imposed only in cases where papers containing such violations have been sent through the mails as second class matter. This argument is founded in part upon a so called construction and in part upon a fine metaphysical distinction drawn between "typographical" and "literary" paragraphs.

The argument is without warrant because *(a)* the language is not susceptible of the construction claimed; *(b)* the evi-

denced intent of Congress is to the contrary; *(c)* the construction asked would amount to judicial legislation; *(d)* the construction of the Attorney General of the United States and of the Postmaster General is to the contrary; *(e)* the regulation of second class mail is already fully covered by provisions of statutes in no way affected by this Act and the provisions of this Act are not necessary for the purposes for which the Solicitor General contends.

A.

The entire argument of the Solicitor General is based upon an attempted construtions by which it is made to appear that compliance with the Act is not required, but is a condition precedent to the granting of second class mail privileges. Not alone impliedly, but actually he concedes in his brief (pp. 21, 48) that if such construction be not made and followed the statute in more than one respect is invalid. The cleverness and boldness with which this argument is advanced almost cause one to lose sight of the false premise upon which it is based and the fallacious assumptions with which it is built up.

The language used is plain and unequivocal. It is not susceptible of any other than its plain meaning. It says unless the publisher does certain things, he shall be denied the privileges of the mail. It does not say he shall be denied the privleges of the second class mail. Second class mail is not mentioned.

The word "mail" has a commonly accepted meaning—

Funk & Wagnalls Standard Dictionary:

> "1. The governmental system for conveying and delivering letters, parcels, etc.; hence restrictively the person or the conveyance that carries such matter, or the bag in which it is placed for conveyance; 2. Matter in general that is conveyed by post, collectively;

that which is sent by post at a particular time or by a special route ; as the mail is in."

It has the same meaning in law—
Bouvier's Law Dictionary :

> " The bag, valise or other contrivance used in conveying through the post-office letters, packets, newspapers, pamphlets, and the like, from place to place, under the authority of the United States. The things thus carried are also called the mail.
>
> The laws of the United States have provided for the punishment of robberies or wilful injuries to the mail; the Act of March 3, 1825, 3 Story U. S. Laws 1895."

United States v. Wilson (U. S.), 28 Fed. Cas. 699-771.

> " The term " mail " means a bag, valise, or portmanteau used in the conveyance of letters, papers, and packages by any person acting under the authority of the Postmaster General from one post-office to another. Each bag so used is a " mail " of which there may be several in the same vehicle, as the " way mail," the " general mail ", the " letter mail ", or the " newspaper mail "

United States v. Marselis, 26 Fed. Cas. 1167.

> " It is employed as embracing the whole body of mailable matter transmitted from office to office, and also the particular packets addressed from and received at different post-offices."

Wynen v. Schappert, 6 Daly (N. Y.) 558, 560.

> " The term * * * after the establishment of post-offices, post routes, and post coaches became, as it is now, a general word to express the carriage and delivery of letters by public authority."

United States v. Rapp, 30 Fed. 818, 822.

> " 'Mailing' to come within the provisions of Rev. Stat. §§ 5467–5469, must get into the mail in some of the ordinary ways prescribed by the postal authorities, and become fairly and reasonably a part of the mail matter under the control of the postal department."

From these authorities it appears that the word " mail " embraces the entire postal system, the instrumentalities of conveyance and delivery, and the entire body of matter thus conveyed. It applies equally to the sending of matter " first ", " second ", " third " or " fourth " class. The use of the term imports no limitation and permits of no restriction. It is all embracing in its scope and cannot be confined without the use of words of express limitation such as " first class " mail, " second class " mail, etc.

It is not and cannot be restricted by the use of the word " privileges " for the word is plural and includes all privileges whether of the " first ", " second ", " third ", or " fourth " class. The Solicitor General himself contends that no one has a vested right to use the mails although impliedly admitting that the use when granted or refused must be granted or refused to all alike. Hence, it must be that the use of the mail, no matter the class, is a privilege that Congress in its reasonable discretion may grant or refuse according as the health, happiness or welfare of the public or the service of the department may require. Combined as " privileges of the mail " coupled with the word " denied " the words can mean but the denial of entire postal facilities. And that is exactly what Congress intended.

B.

The Act of August 24th, 1912, is mainly an appropriation Act, but contains other provisions relating to the post office department and the regulation of the mails. Under the head-

ing of "Office of the Third Assistant Postmaster General" it contains an amendment to the Act of March 3, 1879, establishing mail classifications, by providing that certain publications not theretofore entitled to the second class rate shall hereafter be admitted as second class matter and prescribing the conditions that must be shown to exist before the entry as second class matter will be accepted. It did not, however, include the sections here under discussion under the same subdivision, nor did it "hitch" the sections to any other provisions of the Act in any way relating to second class matter, but on the contrary included these provisions under an entirely different sub-heading having no relation to second class mail. Is it not reasonable to suppose that if Congress had intended this to be a provision operating as a condition precedent to the entry of second class matter that it would have included it with the other provisions relating to such class? And is it not to be believed that if Congress had intended these provisions to be conditions precedent it would have plainly said so as it did in the Act of March 3, 1879? *

---

* Act March 3, 1879.

"Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen."

"The conditions upon which a publication shall be admitted to the second class are as follows:

FIRST: It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

SECOND: It must be issued from a known office of publication.

THIRD: It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

FOURTH: It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, However, That nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Here there is nothing to indicate that a publisher must comply with these provisions before entry. On the contrary if not already entered he may enter his paper as second class matter on the 1st day of July or any other day in any year or commence sending it through the mail as first or fourth class matter without the slightest regard for these requirements. Thereafter, however, if on or about October 1st and April 1st in each year he fails to comply with this Act he is denied postal facilities for his publishing business.

Nor does the use of the word entry indicate an intention to limit the operation of the act to second class matter. Congress may have assumed that every publisher entitled so to do would avail himself of the second class rate. Such an assumption would undoubtedly be more nearly correct than the assumption of its Committee that with the purpose of this Act a vast majority of the newspapers and periodical publishers are in *hearty accord.* The word entered is used only for the purpose of designating the postmaster with whom the required statements shall be filed and is not used for the purpose of identifying the persons who shall cause the filing to be made.

Furthermore, the provision regarding the marking of paid articles "advertisement" can have no relation to the mail of any class. The penalty is imposed for "printing" not for mailing. This seems too evident to require discussion.

C.

Any other construction than that we have pointed out requires the reading into the Statute of words that are not now to be found therein and which it must therefore be assumed Congress intended to omit.

In order to give the effect contended by the Solicitor General, this Court is asked to prefix to the paragraphs in question a suitable phrase such as "*before any newspaper, period-*

ical, etc., shall be entitled to be admitted to the second-class mail" and to insert the words "*second-class*" in the expression "*privileges of the mail*" and to insert the words "*and mailing*" after the word "*printing*" in the paragraph relating to advertising matter and to provide the other necessary changes to make the Statute uniform and workable. In other words, judicial legislation is asked—something that this Court has always refused. In

United States v. Reese, 92 U. S. 214,

this Court was asked to hold that legislation in itself sufficiently broad to embrace acts beyond as well as within the constitutional jurisdiction, could yet be held valid and enforceable by judicial construction, so as to make it operate only upon that which Congress could rightfully prohibit and punish. In denying power so to do this Court said (p. 221):

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The Courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the Courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In

Trade Mark Cases, 100 U. S. 82,

this Court in considering a federal statute attempting to regulate and control trademarks generally, said (p. 98):

"It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these Statutes shall be held valid in that class of cases, if no further. * * * While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the Court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not with the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States v. Reese*, 92 U. S. 214. In that case Congress has passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This Court

was of the opinion that, as regarded the section of the statute under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude.

"It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court said" (here follows the above quotation from U. S. v. Reese, *supra*).

In

James v. Bowman, 190 U. S. 127,

the Court in discussing a similar situation, quoted at length from the above cases, saying, page 142:

"We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested or in which some mandate of the National Constitution is disobeyed and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

Holden v. Stratton, 198 U. S., 202, 210:

"It is not to be doubted that the broad terms of the statute, as ordinarily understood, embraced both of the policies, and it would not be construction but legislation to restrict the meaning of the statute in accord with narrower legislation in other States, because in the judgment of the Court it might seem equitable to do so."

D.

We have stated that the construction of the Attorney General of the United States and of the Postmaster General is contrary to the views now advanced by the Solicitor General.

To be satisfied on that point one needs but to read the opinion of the Attorney General given to the Postmaster General for the latter's guidance and under and in accordance with which the Postmaster General is proceeding to enforce the Statute. Copies of this opinion have been published and distributed for the guidance of publishers. Such opinion follows:

POST OFFICE DEPARTMENT

OPINION OF THE ATTORNEY GENERAL CONSTRUING A PROVISION OF THE ACT OF AUGUST 24, 1912, REQUIRING NEWSPAPERS TO MAKE CERTAIN RETURNS RESPECTING CIRCULATION, ETC.

DEPARTMENT OF JUSTICE,
WASHINGTON, September 25, 1912.

THE HONORABLE THE POSTMASTER GENERAL:

SIR: In your letter of September 14 you call my attention to certain provisions of section 2 of the act entitled "An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes" (Public, No. 336), approved August 24, 1912, which makes it the duty of the editor, publisher, business manager, or owner of every daily newspaper, to file with the Postmaster General and the postmaster at the office at which such publication is entered, not later than the first day of April and the first day of October in each year, on blanks furnished by the Post Office Department, a sworn statement which shall include—

the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months * * *

a copy of which sworn statement shall be published in the second issue of such newspaper printed next after the filing of such statement, and which publication, it is enacted—

shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

You ask my opinion as to—

Whether or not this statement should be limited to paid individual subscriptions, or shall include purchases in bulk by news agents or others for redistribution; also whether in your opinion the provision covers paid circulation of daily newspapers not distributed through the mails.

The provision is highly penal in its nature, as a consequence of failure to comply with it is punished by denying to the publication the privilege of the mails; not merely the privilege of being carried in the mails as second-class mail matter, but the privilege of being carried in the mails at all. Being, therefore, in derogation of common right, the provision should not be construed to embrace anything more than falls clearly within its terms, and by those terms the requirements of the statement are limited to—

the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months.

The verb "to subscribe" has a definite meaning in both a legal and a popular sense, and is defined as—

To promise a certain sum, verbally or by signing an agreement; specifically, to undertake to pay a definite amount, in a manner or on conditions agreed upon, for a special purpose; as, to subscribe for a newspaper, or for a book (which may be delivered in instalments); * * * In law the word implies that the agreement is made in writing. (Century Dictionary and Cyclopedia.)

Or again:

To engage oneself, or to give ones formal consent, by signing any pledge, contract, deed, document, or written statement of any kind * * *: To pledge oneself, especially by writing

to pay a given amount of money. To authorize the entry of a name on the list of those who agree to receive and pay for an article, as a periodical, an engraving, or a book sold by securing purchasers in advance of delivery. (Standard Dictionary.)

To become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber. (Ashton *v.* Story. 96 Iowa, 197, 201; 64 N. W. Rep., 804.)

Thus, a subscription to the capital stock of a corporation implies an agreement to take and pay for it. But if the steps taken, although informal, are treated by the corporation and the subscriber as sufficient, they will be treated as binding. (Cressy *v.* Cook, 67 Kans., 20, 23; Nugent *v.* Supervisors, 19 Wall., 241.)

The distinction between circulation among paid subscribers, and the casual or uncertain distribution to other purchasers has been recognized by the Post Office Department in its regulations (Ed. 1907, sec. 469), where, after pointing out that the news agent's right to mail second-class publications at the pound rate of postage, under the provisions of the act of March 3, 1885, chapter 342, extends only to actual subscribers thereto, and to other news agents for sale, the regulations state that—

> Actual subscribers to second-class publications are persons who personally order the same for a period of at least three consecutive issues.

Subscribers, therefore, are clearly those who have by agreement undertaken to receive and pay for the publication for some specified period of time, as distinguished from casual purchasers who come under no obligation to take and pay for the publication in advance of its delivery. It is immaterial whether this subscription is for one or many copies. Subscriptions may be direct, or through an agent; but the delivery to agents for sale or distribution, unaccompanied by agreement to pay for any definite number, would not be included within the term "subscribers."

With respect to publications seeking the privilege of the second-class mail rate, as shown below, the Postmaster General is required to determine certain matters of fact upon which depends the enjoyment of that privilege, among which is the

question whether or not there is "a legitimate list of subscribers" to the publication. (See 20 Op., 384). But the clause in the act of 1912 under consideration devolves no such duty upon you. It makes it the duty of the editor, publisher, business manager or owner to file a sworn statement containing among other things the matters above specified, on blanks furnished by the Post Office Department. These blanks should call for the information required by the statute—no more, no less. If the statement is not filed as required by law, or if the information required is not what the statute demands, the publication may be denied the privilege of the mail if it fail to comply with the provisions of the law within 10 days after notice by registered letter of such failure. While the statute does not expressly make it the duty of the Postmaster General to give such notice, yet I think it may be fairly implied from its provisions that it would become his duty to give the notice in all cases where (1) the editor, etc., of any publication of whose existence the Postmaster General has knowledge shall fail to file the statement required by law; or (2) the statement on its face shall not conform to the statute; or (3) information shall be laid before the Postmaster General which satisfies him that the information furnished in the statement is inaccurate or untrue. In either event, if the privileges of the mail should be denied because of failure to comply with the statute, the burden would be on the Government to establish such failure.

The provisions of the statute under consideration should not be confused with those of the statutes relating to second-class mail matter, and they in no respect limit or affect the power of the Postmaster General to require full information to be furnished to him to enable him to determine whether or not a given publication is entitled to the privileges of the second-class mail rate.

The act of March 3, 1879 (R. S., 1st Supp., 246), provides that mailable matter of the second class

shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as

four times a year and are within the conditions named in sections twelve and fourteen.

Among the conditions which by section 14 must be met before a publication is admitted to the privilege of the second class are those of subdivision fourth, namely:

It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, however, That nothing herein contained shall be so construed as to admit to the second-class rate publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

The act of August 24, 1912, extends the benefits of the second-class mail rate to certain publications to which it has not heretofore been granted. But the provisions of that paragraph, which are found under the head of "Office of the Third Assistant Postmaster General," do not otherwise conflict with the provisions of the act of March 3, 1879, or the amendment to it approved March 3, 1885 (chap. 342), except that with respect to some of the publications issued by or under the auspices of benevolent or fraternal societies or orders, or trades-unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, they are limited

to copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than fifty per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and ten per centum of such circulation as sample copies: *Provided further*, Then when such subscribers pay therefor as a part of their dues or assessments individual subscriptions or receipts shall not be required. * * *

Independently of this amending act, in order that the Postmaster General may determine whether or not a publication applying to be admitted to the second class has a legitimate list of subscribers, and is not designed primarily for advertising purposes, or free circulation, or for circulation at nominal rates, the Postmaster General is entitled to require full and complete statements showing the character of the business of

the publication, and by section 436 of the Regulations (Ed. 1902) he has required postmasters to secure satisfactory evidence that publications so offered for entry have

a legitimate list of subscribers approximating 50 per cent. of the number of copies regularly issued and circulated, by mail or otherwise, made up not of persons whose names are furnished by advertisers or by others interested in the circulation of the publication, but of those who voluntarily seek it and pay for it with their own money, although this rule is not intended to interfere with any genuine case where one person subscribes for a definite period of several issues for a limited number of copies for another.

And by section 438, the postmasters are directed to require the proprietor or duly authorized representative, on applying for second-class mail privilege, to furnish detailed information of a character deemed requisite by the Postmaster General to enable him to determine whether or not the publication falls within the requirements of the acts of Congress. **The right of the Postmaster General to exact this information is in no respect impaired or affected by the provisions of the statute under consideration. Those provisions are inserted as a part of the act of 1912, which is apparently designed to insure publicity as to the ownership and control of the publication. This particular clause was inserted by amendment just before the passage of the act, and bears no very ascertainable relation to the subject matter of the paragraph in which it was inserted. It is a provision of statute law which should be complied with to the extent which its language requires, but it should not be extended beyond that language.** (See Payne *v.* Railway Pub. Co., 20 App. D. C., 581; People ex rel Opydke *v.* Brennan, 39 Barbour, 651.)

Answering specifically your inquiry, therefore, in my opinion, (1) it is immaterial whether or not the subscriptions are individual or in bulk. The statement should include the average of the number of copies of each issue of such publication sold or distributed to all persons who have subscribed; that is, have agreed to take and pay for one or more copies of

the publication for a definite period of time, and have paid for such subscriptions; and (2) in my opinion, the provision covers the number of copies of such publication distributed to such paid subscribers by any means, whether by the mails or otherwise.

Respectfully,
GEO. W. WICKERSHAM,
Attorney General.

The construction given the Act by the Attorney-General has been adopted by the Postmaster General and as such should not be disturbed unless clearly wrong.

United States v. Philbrick, 120 U. S., 52, 59.

> "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes, is entitled to great weight; and since it is not clear that the construction was erroneous, it ought not now to be overturned."

See also,
United States v. Hermanos, 209 U. S. 337.

E.

Finally these provisions were not necessary for the purposes for which the Solicitor General contends. As pointed out by him, some of the matters here required were previously required under the Act of 1879 as conditions precedent to the allowance of the second-class rate.

Congress has not indicated any dissatisfaction with the requirements heretofore and still in force, but shows as expressed solely a desire for publicity as to the internal affairs of newspapers, etc. Hence, the provision for the publication of the statements containing the information.

As it stands today, the Act of 1879 requires among other things that the publisher as a condition to receiving the second

class rate, shall furnish to the postmaster certain of the information required by this Act. Why then the need for repetition as to these matters? One reason alone. To establish a censorship and insure publicity.

Respectfully submitted,

ROBERT C. MORRIS,

GUTHRIE B. PLANTE,

Of Counsel for Appellant.

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Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 818.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF COUNSEL FOR APPELLANT.

ROBERT C. MORRIS,
GUTHRIE B. PLANTE,
Counsel for Appellant.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

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CASES AND AUTHORITIES CITED:

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster General of the United States of America, *et al*,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF COUNSEL FOR APPELLANT.

Introductory Statement.

This is an appeal from a final judgment of the District Court for the Southern District of New York, sustaining a demurrer of the defendants to complainant's bill and dismissing the bill with costs.

The action was brought by The Journal of Commerce and Commercial Bulletin as the owner and publisher of the daily newspaper known by the title of "The Journal of Commerce & Commercial Bulletin," and as the owner and publisher of the weekly newspaper known as "The Review," both published in the City of New York and elsewhere throughout the

United States, to have certain paragraphs of an Act of Congress of August 24th, 1912, declared unconstitutional and void and to have the defendants restrained from enforcing such illegal provisions.

The title of the Act and the sections complained of are as follows:

> " AN ACT MAKING APPROPRIATIONS FOR THE SERVICE OF THE POST OFFICE DEPARTMENT FOR THE FISCAL YEAR ENDING JUNE THIRTIETH, NINETEEN HUNDRED AND THIRTEEN, AND FOR OTHER PURPOSES.
>
> " SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication, to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees or other secuity holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of

this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement'. Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

The facts shown by the bill of complaint, briefly stated are: That The Journal of Commerce & Commercial Bulletin is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, with an authorized capital of $700,000, and an investment of greatly in excess of the sum of $1,000,000; that The Journal of Commerce and Commercial Bulletin publishes a daily newspaper known as "The Journal of Commerce & Commercial Bulletin," and a weekly newspaper known as "The Review," both of which are published in the City of New York, Southern District of New York, and elsewhere throughout the United States; that there is an issue of outstanding mortgage bonds secured by mortgage upon all or some of its property, and that there are likewise other obligations and securities outstanding; that by reason of the business methods of The Journal of Commerce and Commercial Bulletin and of the character of the newspapers published by it, such newspapers are well and favorably regarded by the general public, and that such newspapers have a large and extensive circulation and possess a wide and favorable reputation as advertising mediums, and by reason of such reputation said newspapers possess a very valuable and highly profitable business in publishing advertisements, and the business very

largely depends for its profits upon the revenue derived from its advertising patronage.

That in the publishing and circulating of said newspapers many thousands of copies of said newspapers are sent through the mail to the readers thereof and subscribers thereto and others, and The Journal of Commerce and Commercial Bulletin relies upon the mail as a means of so circulating and publishing its newspapers to many of its subscribers and others who purchase and read the same, and without the use of the mails it would be unable to circulate its newspapers and unable to deliver the same to its subscribers and others and to the general public, and without the use of the mail it would be put to such inconvenience and trouble and caused such delay in the delivery thereof that said newspapers would not be received by subscribers and others within a reasonable time after the respective days of the issue thereof, and, in fact, would not be received until after such a lapse of time as to make the newspapers valueless to the subscribers thereto.

That the denial of the use of the mails to it for the circulation of its newspapers would result in the entire loss of its subscription list and would result in a loss in the annual sales of many thousands of copies of said newspapers, and would cause serious injury to the reputation of said newspapers, would seriously curtail and hamper its business and increase the expense thereof and the expense of circulating said paper, all of which would cause a falling off in its advertising patronage and a decrease in the returns thereof and would cause a loss in the profits of its business and its said business of newspaper publishing would be irreparably impaired and injured.

That the denial of the use of the mail to it for the circulating of its newspaper would result in serious inconvenience to thousands of leading business concerns in all parts of the United States and in almost every branch of trade, for the reason that the information supplied by it is of great import-

ance, and to deprive the subscribers to its newspapers and others who daily purchase and read the same of such information would, in numerous cases, cause much loss and injury.

That the denial of the privileges of the mail to the newspapers published by it would not only inflict an injury upon it, but would also embarrass and deprive the business public of the use of valuable instruments in their business affairs.

That in addition to the newspapers published by it, upwards of twenty-five thousand newspapers, magazines and periodicals are published in and throughout the United States, each of which is doing a large and thriving business, and together the owners thereof have made investments in the United States of America of cash capital aggregating many millions of dollars, and each and all thereof are equally affected by the said legislative enactment.

That the Act in question provides that the editor, publisher, business manager or owners of newspapers, magazines or periodicals, shall file with the Postmaster-General and the Postmaster at the office at which said publication is entered, and publish to the world, twice each year, certain statements as to its private business affairs, containing information to which the public is not entitled, under penalty for noncompliance of denial of the privileges of the mail, and that all editorial or other reading matter published in any such newspaper, magazine or periodical, for the publication of which money or other valuable consideration is paid, accepted or promised, shall be plainly marked "advertisement," and failure to do so shall subject the editor or publisher, upon conviction, to a fine of from $50 to $500.

That The Journal of Commerce and Commercial Bulletin has never disclosed the information required by the Act as to its stockholders, known bondholders, mortgagees, or other security holders to the government of the United States, or any department thereof, or official therein, or the public at large, but has always treated and regarded the

same as private information relating to its own private business affairs, and has refused at all times to furnish statements thereof, except to its officers, directors and stockholders and others interested therein and by reason thereof entitled to such information ; that it does not publish in its said newspaper or said weekly any advertisements as editorial or reading matter, but it does publish in its said newspaper reading notices and other reading comment, criticisms or reviews, for which either directly or indirectly some valuable consideration is frequently paid, accepted or promised, and some and all of which are not marked "advertisement." That all such matters are matters of business arrangement or of favor or otherwise between it and its advertisers, or other person by whom the consideration, directly or indirectly, is promised or paid or from whom it is accepted, and are of no public concern. That the denial of the privileges of the mail would practically result in ruin to its business, would subject it to a multiplicity of suits and prosecutions, and its property would be taken and dissipated by fines.

Appellant assigns as error on this appeal (Record, pp. 17, 18):

First. That the Court erred in sustaining the demurrer of the defendants to the bill of complaint and in dismissing said bill, in holding that the said bill was without equity.

Second. That the Court erred in not decreeing that the sections and provisions of said Act above quoted were unconstitutional and void and that said sections and provisions thereof were violative of Articles I. and V. of the Amendments to the Constitution of the United States and that the same were and are illegal and void enactments and beyond the legislative power of Congress.

Third. That the Court erred in not decreeing that the complainant was entitled to the relief prayed for.

Fourth. That the Court erred in dismissing said bill of complaint with costs.

ARGUMENT.

The assignment of errors filed (Record, pp. 17, 18), present several questions involving objections to the Act that appear upon its face. In brief, these questions are as follows :

(1) That the Act deprives appellant of its liberty and property without due process of law, by compelling appellant to file certain required statements and publish the same to the public at large under penalty for non-compliance of a denial of the privileges of the mail.

(2) That the Act discriminates against appellant to the advantage and benefit of other corporations and persons, citizens of the United States, and denies to appellant the equal protection of the laws by compelling it and other owners of similar publications to file certain required statements and publish the same to the public at large, while not demanding that all other persons or corporations shall be obliged to do the same, under penalty for non-compliance of a denial of the privileges of the mail.

(3) That the Act abridges the freedom of the press by compelling the filing and publication of certain required statements under penalty for non-compliance of a denial of the privileges of the mail, and as it dictates to appellant what shall or shall not be published in its newspapers, and the form in which certain matters shall be published, establishing a governmental control, which is of no material benefit to the government or to the public at large, nor of aid or assistance in the operation or management of the Post-Office Department, nor in the regulation of the mails or the carrying of mail matter.

(4) That the act is illegal and void and beyond the power of Congress to enact, being an usurpation by Congress of powers expressly reserved to the several States of the United States, in that it is legislation affecting matters with which

the several States of the United States alone have the right to treat by legislation or otherwise.

These questions are now presented for the consideration of this Court in the order above set forth and are urged with equal insistence.

I.

The Act violates the Fifth Amendment to the Constitution in that it deprives the Journal of Commerce and Commercial Bulletin of Liberty and Property without due process of law.

In using the terms "liberty and property" we do so in the broad sense that the words are construed to have been used in the Constitution of the United States, and in a strictly legitimate sense in law, that interference with the profitable and free use of property by its owner arbitrarily deprives him of his property and of some portion of his personal liberty.

Chicago, etc., Ry. v. Minnesota, 134 U. S., 418.
Smyth v. Ames, 169 U. S., 466, 523.
Munn v. Illinois, 94 U. S., 113.
In re Jacobs, 98 N. Y., 98.
People v. Otis, 90 N. Y., 48, 52.

The Act in question requires that certain sworn statements shall be filed by newspapers, magazines and periodicals, twice each year, with the Postmaster General and the postmaster at the office at which such publication is entered, containing, among other matters, the name of the owner of such publication and, if it be owned by a corporation, the names of stockholders owning more than one per centum of the total amount of stock, and the names of known

bondholders, mortgagees or other security holders owning more than one per centum of the total amount of such bonds, mortgages or other securities. Also, in the case of daily newspapers a statement of the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. The Act then provides that not only shall such statements be filed with the government, but that such statements shall be published in the second issue of such publication printed next after the filing of such statement, thus giving this private information to the public. Religious, fraternal, temperance and scientific publications are exempt from filing such statements. The Act then provides that if any specified publication shall fail to comply with these provisions it shall, within ten days' notice by registered letter of such failure, "be denied the privileges of the mail."

At this point there are three questions to be considered: first, the power of Congress to enact a law directing the Post Office Department to put its machinery into operation demanding from citizens of the United States the revealing to the government of their private business and financial affairs, not in aid or assistance in the operation of the Post Office Department, nor for the purpose of the regulation of the mails or the carrying of mail matter, nor for the furtherance of any other governmental power or function; second, the power to compel the publisher, not only to divulge this private information to the government, but to publish it to the world at large; and third, the power of denying the privileges of the mail to publications which do not comply with these requirements.

By Sub-Division 7 of Section VIII. of Article I. of the Constitution of the United States it is provided that Congress shall have power "to establish post-offices and post roads," and by Sub-Division 18 of the same section it is provided that Congress shall have power "to make all laws which shall be

necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." It cannot be denied that in the power thus granted to Congress all incidental powers are granted which are necessary for the regulation of the mail service, such as the limiting of the carriage of mail matter so as to render the service practicable to all the people and, therefore, to exclude matter from the mails to that extent. Neither can it be denied that Congress has the power to enact legislation for the exclusion from the mails of matter which is injurious to the public morals, public health or the public welfare, or which is a menace to the national peace. Necessarily, therefore, the question presents itself is this Act "necessary and proper" in connection with the power to establish, maintain and regulate post offices and post roads. Such a question is properly the subject of judicial inquiry,

McCulloch v. Maryland, 12 Wheat, 316, 420,

and any such judicial inquiry must look to whether there is an advantage to be derived to the benefit of the people and whether Congress has adopted a legitimate means of obtaining such object.

The provisions objected to were inserted in legislation appropriating moneys for the maintenance of the postal establishment and have no relevancy thereto. It is clear that they are not intended to regulate the mail service or the carriage of mail matter, for they do not fix rates, classify matter, or exclude obscene or otherwise injurious literature. Neither are they in aid of the police power, for the matter affected is in itself entirely decent and proper, in no way tending to injuriously affect the morals or welfare of the public. They do not possess the justification of an inquiry under the specific power of Congress to regulate commerce among the several States, for the preventing of undue discriminations or favoritism, nor of

an inquiry into the affairs of a corporation under the authority of Congress to lay and collect taxes, duties, imposts and excises, for no revenue is derived to the government. Nor can it be said that such provisions are within the incidental powers impliedly granted to enable the Federal government to properly perform the powers and duties directly imposed upon it for they have no relation to any such duties or functions. In fact, these provisions are not only unnecessary to the powers granted and their administration, but are wholly lacking in any object beneficial to all the people.

The one great purpose of the constitutional power to establish post offices and post roads was to furnish mail facilities to all the people. An *Index Expurgatorious* has been built up from time to time by Congress for the exclusion of all harmful matter or matter impracticable to be handled, but until the enactment of this legislation no attempt has ever been made to exclude matter from the mail unless it comes within these categories. This legislation not being a means to accomplish the legitimate purpose of the maintenance of the postal establishment, or the regulation of the mail service, or the exclusion of harmful matter or matter which it is impracticable to handle, is an attempted exercise by Congress of powers neither expressly or incidentally granted and impliedly condemned by the Constitution.

United States v. Fox, 95 U. S., 670.
United States v. Reese *et al.*, 92 U. S., 214.
Dent v. West Virginia, 129 U. S., 114.
Cummings v. Missouri, 4 Wall., 277.
Ex parte Garland, 4 Wall., 333.

There being no justification by express or implied power to Congress for the legislation in question, with no public service to be subserved, it is an unwarranted, arbitrary and unreasonable interference with lawful private rights, invading personal freedom and confiscating and destroying private property. As was said in

Mugler v. Kansas, 123 U. S., 623, 661,

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

The provisions of the Act complained of are a palpable invasion of rights secured by the fundamental law, for Congress has attempted to compel the disclosure of private affairs to the government and their publication to the public without express or incidental power and without even the justification therefor of benefit to the people. This inquisition and publication is in derogation of the inherent rights of the citizen to freedom of liberty and property in the exercise of a lawful occupation.

The word " liberty " as employed in the Constitution of the United States, is not mere freedom from arrest and restraint, but embraces the broader conception of freedom of action, freedom in the selection of a business calling or avocation, freedom of the citizen in the use and control of his property, so long as he does not violate the rights of others, freedom in exercising the rights, privileges and immunities that belong to the citizen generally, and freedom in the conduct and pursuit of a lawful business.

Allgeyer v. Louisiana, 165 U. S., 578.
Booth v. Illinois, 184 U. S., 425.
Ex parte Virginia, 100 U. S., 339, 344.
Munn v. Illinois, 94 U. S., 113, 142.
Lansburgh v. District of Columbia, 11 App. D. C., 512, 521.

In Butchers Union Company v. Crescent City Company, 111 U. S., 746, 762, Mr. Justice BRADLEY in his concurring opinion in that case said:

> "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen."

Also on page 764, the learned justice said:

> "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

and on page 765:

> "But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes away from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen."

The provisions of this Act complained of do not provide for any legal procedure in which books and papers are to be produced as the basis for the commencement of an action or a judicial inquiry, but they simply provide for the filing of certain statements with the Post Office Department and their publication to the world at large and in the event of noncompliance the arbitrary deprivation of the most important

medium for the conduct of the business of publishing a newspaper.

A copy of the sworn statement must be published for the public to read, not for their advantage or protection, but to the disadvantage of the owner of the newspaper who is subjected to jeopardy unknown to the common law or to modern procedure. The word "liberty" embraces the right to keep secret one's books and papers, his business methods and his knowledge of his own affairs. The right of society only extends to the point of sacrifice in the liberty of its individual members when such sacrifice is the result of due process of law. There must be, and is, reasonable protection against the danger of abuse and no general inquiry into private affairs should be permitted. Vested rights must not thus arbitrarily be interfered with.

In re Davies, Attorney General of the State of New York, 168 N. Y., 89, 105.

As was said by Mr. Justice HARLAN in Interstate Commerce Commission v. Brimson, 154 U. S., 447, 478:

> "We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S., 168, 190. We said in *Boyd v. United States*, 116 U. S., 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice FIELD *In re Pacific Railway Commission*, 32 Fed. Rep., 241, 250, '*of all the rights of the citizen, few are of greater importance or more essential to his*

peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' " (Italics ours).

In this Act there is injury inflicted upon the individual without any corresponding benefit to society. It requires the individual to submit to inquisition regarding his private affairs without any customary legal procedure, and its effects are far-reaching and portentous. If the corporation is doing business upon borrowed money for which it has issued its notes or other obligations it must publish to the world the holders of such obligations, to the annoyance of such lenders and the endangering of its credit. It must show the vulnerable spots in its financial armour to the benefit of its competitors and enemies. Banks and other large financial institutions will refuse to loan it money for fear that they will be held out and advertised as supporting or controlling its editorial or political policy. Nor are these fanciful objections. To the business man they are real and alarming.

If the class of citizens here concerned can be subjected to such an invasion no citizen is safe in the right of privacy, the right to keep from the general public his business methods and secrets, the right to the custody of books, papers and correspondence and the general right to shut out the world from private affairs, and Congress can likewise require citizens in all other callings to furnish like information under similar penalties for refusal.

Denial of the privileges of the mail in the manner prescribed by the Act is "without due process of law." This historic formula has descended to us from the time of the Magna Carta of King John, 1215, whose 39th Chapter provides that "no freeman shall be arrested, or detained in prison, or disseized, or outlawed, or banished, or in any way molested;

and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." This was re-formed in Chapter 29, 9 Henry III., so as to read "Nullus liber homo capiatur vel imprisonetur aut disseisietur *de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis*, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae." So that the final form of the clause reads "No freeman shall be * * * disseized of his freehold, or liberties, or free customs * * * unless by the lawful judgment of his peers and by the law of the land." Then came the Confirmatio Cartarum, in 1297, taking the Magna Carta out of the class of mere statutes and placing it in a position of almost holy reverence to which the thoughts of succeeding generations have been directed regarding it as the institution guaranteeing the greatest of all rights, those of life, liberty and property. Through the Renaissance, the Reformation and the Revolutions of 1640 and 1688 grew the broader conception of this institute of civil liberty. Magna Carta, the ancient Constitution of England, merged into the modern Constitution and at the time of the severance of the British Colonies in America from the mother country the doctrines of Coke in his Institutes and the more modern Blackstone in his Commentaries, in which he treats largely of the guarantees of civil liberty, permeated the thoughts of American statesmen and produced an influence on their minds which caused them to evolve in the Constitutions of the several States and in the Federal Constitution the great fundamental principle that no person shall be deprived of life, liberty or property without due process of law. The Commentaries of Blackstone were taught at William and Mary College, before the Revolution of 1776, which numbered among its students, Marshall, Jefferson, Monroe and others who became eminent jurists and statesmen and the influence of this training produced an effect which re-

sulted in the transplanting of certain principles of government from the English Constitution of that time as defined by Blackstone into our Federal Constitution. As Mr. Justice CURTIS said in Murray v. Hoboken Land & Improvement Company, 18 How., 272, 276:

> "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*. Lord COKE, in his commentary on those words (2 Inst., 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the Great Charter more closely, generally contained the words, 'but by the judgment of his peers or the law of the land.'"

Likewise, after the adoption of the Fourteenth Amendment, in which appears a similar provision, this Court, in the opinion of Mr. Justice MILLER, in Davidson v. New Orleans, 96 U. S., 97, 101, said:

> "The prohibition against depriving the citizen or subject of his life, liberty or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the Fourteenth Amendment, in the year 1866.
>
> "The equivalent of the phrase, 'due process of law,' according to Lord COKE, is found in the words, 'law of the land,' in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the Crown."

The definitions of the phrase "due process of law" are so varied that it is difficult to give an accurate general definition. It is sufficient to say that nothing can be the law of the land

in the sense of the Constitution, however general it may be and however it may affect the rights of all persons alike, which by legislative enactment seizes, forfeits or destroys the property of a citizen or interferes with its proper use without express or incidental authority to Congress under the Constitution.

Due process of law is not confined to judicial process and cannot be thus restricted. It extends to every case which may deprive a citizen of life, liberty or property, whether the process be judicial, or administrative, or executive in its nature.

Stuart v. Palmer, 74 N. Y., 183, 190.

As was said by Mr. Justice MILLER in McMillen v. Anderson, 95 U. S., 37, 41:

> "The nation from whom we inherited the phrase 'due process of law' has never relied upon the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation."

A legislative enactment must be in accord with the express or incidental powers granted to Congress by the Constitution, and if it deprives a citizen of life, liberty or property, unless by virtue of such express or incidental powers, it is not due process of law. Here, as we have already pointed out, the provisions of the Act complained of do not come within any power of Congress either express or implied and they are, therefore, in contravention of the Fifth Amendment. The Act does not provide any revenue to the government, it is not for the purpose of regulating commerce, it does not regulate the mail service, and it is not "necessary and proper" to the post-office establishment.

Neither does the Act come within the police power, though Congress may have thought so. Police regulations, which

would otherwise be within the prohibitions of the Constitution, can be only such as are clearly necessary to protect the public morals, the public health and the public safety.

If, then, it is absolutely necessary to the public morals, the public health, or the public safety that a newspaper shall file a statement of its private affairs with the government and thereafter publish such statement to the world at large, the provisions of the Act in question might be termed a valid exercise of the police power, but unless such absolute necessity exists the police power cannot be invoked to compel the filing and publication.

In Colon v. Lisk, 153 N. Y., 188, 196, the Court, referring to the police power, said:

> "Although it includes everything essential to the safety, health, morals and general good of the public, it is by no means unlimited. 'To justify the state in thus interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts.'"

When the police power is exercised in the direction of so regulating the use of private property or so restraining personal action as to secure or tend to the welfare of the people, no constitutional guarantee is violated and the legislative authority is not transcended; but the legislation must be directly to these ends, for, in the mere guise of police regulations, private property or liberty cannot be invaded.

The police power cannot encroach upon vested constitutional rights and the Courts should not be concerned with the probable purpose for which it is attempted to be exercised or uncertain evils which it attempts to correct. The first requirement to the just exercise of the police power is that it must be reasonable, must be moderate and have proportion in its means to the end to be attained.

In Plessy v. Ferguson, 163 U. S., 537, 550, this Court, answering a suggestion as to how this power might be carried out, said :

> " The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

In Mugler v. Kansas, 123 U. S., 623, 661, this Court in considering and holding valid a statute of the State of Kansas prohibiting the manufacture and sale within the State of spirituous liquors, in discussing the police power, said :

> " It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.
>
> " It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S., 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. ' To what purpose,' it was said in *Marbury v. Madison*,

1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In Fisher v. Woods, 187 N. Y., 90, 94, the New York Court of Appeals declared unconstitutional a section of the penal code, which made a misdemeanor the offering of real property for sale in cities of the first and second class without written authority, the Court there saying (pp. 94, 95):

"The constitutionality of this act depends upon the question whether it was a valid exercise, on the part of the legislature, of the police powers of the state. The rules which should control us in the determination of this question appear to be well established by the authorities. The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety or the lives, health and morals of our inhabitants or the welfare of the community. But the legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution nor prevent him from adopting

and following any lawful profession, trade or industrial pursuit not injurious to the community that he may see fit; nor prevent him from making contracts with reference thereto. To justify the state in interposing its authority in behalf of the public, it must appear that the interest of the public generally, as distinguished from those of a particular class, require such interference and that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The legislative determination as to what is a proper exercise of the police power, is subject to the supervision of the court and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority. Liberty, in its broad sense, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways; to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation (*Health Department v. Rector, etc.*, 145 N. Y., 32; *People v. Gillson*, 109 N. Y., 389; *Colon v. Lisk*, 153 N. Y., 188; *Lawton v. Steele*, 152 U. S., 133; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y., 116; *Stuart v. Palmer*, 74 N. Y., 183; *Gilman v. Tucker*, 128 N. Y., 190, 200, and authorities in each case cited)."

In Wright v. Hart, 182 N. Y., 330, 344, it was said:

"It cannot be reiterated too often that the police power must be exercised within its proper sphere, and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom or confiscates or destroys private property, it is repugnant to the Constitution and should not be permitted to stand, no matter how laudable its purpose or beneficial its effect."

Freund, in his treatise on police power, says (p. 61):

> "The question of unreasonableness usually resolves itself into this: is a regulation carried to a point where it becomes prohibition, destruction or confiscation."

Absolutely no authority can be found that the provisions complained of in this Act were enacted for the public benefit. Neither the government nor the public at large can be benefitted by the knowledge of the private business affairs and financial condition of the owner of a newspaper. On the other hand, the provisions objected to in the Act are more than unreasonable in their demands upon the owner of a newspaper—they are perniciously inquisitorial. They strike down private rights, invade personal freedom and destroy private property in that they ruin the publication if it refuses to meet their arbitrary demands, for ruin would surely follow the denial of the privileges of the mail.

II.

The Act discriminates against appellant and other publishers similarly situated and denies to it and them the equal protection of the laws.

Under our Federal Constitution all persons are equal with equal rights; and industries and different kinds of business are entitled to equal protection unless there be something connected with them which is obnoxious to the health, morals or safety of the nation.

It is not of any importance that the Fifth Amendment to the Constitution contains no specific clause as to the equal protection of the laws. Congress cannot assume a power from an

omission, to enact laws which are unjust and unequal, oppressive and arbitrary, and the Fourteenth Amendment is but declaratory of the principle which had long been recognized at the time it provided the phrase "equal protection of the laws." The very spirit of the Constitution is equal protection of the laws, and for the principles established we may look to the reasoning contained in the numerous cases which have arisen and which have been decided since the adoption of the Fourteenth Amendment.

Chicago, etc., R. R. Co. v. Chicago, 166 U. S., 226.
Cotting v. Kansas City Stock Yards, 183 U. S., 79.
Connolly v. Union Sewer Pipe Co., 184 U. S., 540.
Gulf Colorado, etc., R. R. Co. v. Ellis, 165 U. S., 150.
Barbier v. Connolly, 113 U. S., 27.
Duncan v. Missouri, 152 U. S., 377.
Magoun v. Illinois Trust Co., 170 U. S., 283.
Ballard v. Hunter, 204 U. S., 241.
Missouri v. Lewis, 101 U. S., 22.

Equal protection of the laws means equal exemption with others of the same class from all burdens of every kind, for it has been said:

> "Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow.' This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments." Cooley's Constitutional Limitations, 5th Ed., 484, 486.

In Gulf, Colorado & Santa Fe Railroad Co. v. Ellis, 165 U. S., 150, 159, in which was presented solely the question of classification, this Court said, referring to many cases, both state and national:

> "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S., 358, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declarations of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases references must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Turning then to the Act under discussion, we find in its provisions an astonishing disregard for the principles just set forth. It provides (*a*) that the owner of a newspaper or other publication shall file with the Government and publish to the world at large twice each year, a sworn statement showing,

among other things, the names of its known bondholders, mortgagees and other security holders and if a corporation, the names and addresses of its stockholders; (*b*) that the daily newspapers shall include in the statement filed and published, the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. This filing and publishing must be done by appellant and others under penalty for noncompliance of denial of the privileges of the mail. It is here we find the arbitrary discrimination and the imposition of unequal burdens that classifies the Act as class legislation obnoxious to all principles of free government.

Appellant is engaged in a lawful private business. It manufactures and publishes a newspaper which it sells to the public at a stipulated price. It renders services to its advertisers by publishing their advertisements in its newspaper for a compensation which they are willing to pay. The general public has no interest in this business. Its product is not a necessity. It cannot be compelled to publish or sell its newspapers or other publication if it should decide that it did not care to do so. It holds no franchises from the State or Federal Government, is performing no public or quasi-public service and it owes no duty to the public to continue its business or to conduct such business in any particular manner. Its business in no way differs from any other industry whether it be the manufacture of shoes or automobiles or the publication and sale of books. Its business is in all respects private unto itself and cannot be made the subject of governmental interference unless what it is doing in some way offends against the public morals or welfare.

Nevertheless, Congress has assumed to interfere and direct that those engaged in this occupation shall furnish the government with certain information relating to their private affairs and shall publish such information in their newspaper on certain designated dates that all the world may be in-

formed upon such matters. No like requirement under like penalty is imposed upon any other business or calling but publishers of newspapers and periodicals are singled out and required to disclose information as to their private affairs such as is not required from persons in any other calling and are subjected to penalties for failure to comply, which are so arbitrary and severe that they threaten ruin to any one who neglects to obey. This arbitrary and unprecedented action of Congress in placing such oppressive burdens upon appellant and other like corporations and exempting all other occupations and industries, is contrary to the spirit of the Constitution for it denies the equal protection of the laws.

Again, the Act requires that *daily newspapers* shall publish statements of their circulation besides furnishing the same to the Postmaster-General. This information must be given irrespective of whether the circulation is large or small. No other form of publication such as a tri-weekly newspaper, a weekly newspaper or magazine, or a bi-monthly or monthly magazine is required to furnish a statement of its circulation. Daily newspapers are thus singled out and required to disclose business information which heretofore has always been considered private and, in case of non-compliance, are subjected to the penalty of denial of the privileges of the mail. What possible basis there could be for a classification of daily newspapers requiring statements of circulation from them and not requiring similar statements from other newspapers and magazines does not appear. It cannot be that the extent of the circulation has anything to do with the classification for it is a matter of common knowledge that many weekly publications, such as the Saturday Evening Post and the Ladies Home Journal, have a circulation far in excess of the great majority of the daily newspapers published throughout the entire country.

We have been unable to discern that these provisions of the Act are designed to effect any proper governmental purpose

or that the classification pointed out bears any reasonable relation to any proper object sought to be attained. Congress apparently seemed to believe that the public should have the information as to the circulation of daily newspapers. That in itself affords no justification for the Act, otherwise Congress could on a like belief, enact laws requiring manufacturers in all lines of industry, to publish to the world a statement of the goods manufactured and sold by them ; could require them to publish statements of the names of their customers; could require lawyers, doctors and other professional men to publish and disclose the names of their clients. Such information is no more private to the manufacturer, the lawyer and the doctor than is the matter of circulation to the average daily newspaper. Of course, many daily newspapers trade upon their circulation, but, on the other hand, many papers do not trade upon their circulation and cannot afford to do so, and at all times are careful to guard their circulation figures from their competitors. Papers like appellant occupy a special field but do not have and cannot be expected to have the large circulation that exists for some of the current dailies. On the other hand, appellant's business is built up upon the character of the news, the particular class of business information in the special fields which it alone covers and on the character of its paper and on these things alone depends its business integrity and its value as an advertising medium. In such a situation it would be manifestly unfair to compel appellant to disclose its circulation and hold it open to attacks from competitors whose chief stock in trade is a large circulation.

It is clear, therefore, that the Statute not only bears unequally upon different occupations, but that it discriminates between persons engaged in the same or similar business. In neither case is any reasonable basis pointed out as supporting the classification nor is such classification shown to have any reasonable relation to any end or purpose which it purports to attain. It is therefore unreasonable, arbitrary and bad.

III.

The act violates the First Amendment to the Constitution in that it abridges the freedom of the press.

The provisions objected to abridge the freedom of the press, first, by compelling the filing and publication of certain required statements by newspapers, magazines and periodicals under penalty for non-compliance of a denial of the privileges of the mail, and second, by dictating to newspapers, magazines and periodicals what they shall or shall not publish and the form in which certain matters shall be published under penalty of arrest and fine.

This Act, if valid, would establish a federal control over the press of the country never before attempted, contrary to the spirit of our free institutions and in violation of an express commandment of the Constitution.

The Continental Congress, in 1774, in one of their public addresses (Journals, Vol. I., p. 57), set forth five invaluable rights, without which the people can not be free and happy. One of these rights was the freedom of the press and the importance of this right consisted, as they observed,

> "besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs."

Whether the Act of the recent session of Congress under consideration was intended to show the possible influence upon opinion expressed in certain publications by the

holders of their indebtedness, or whether Congress felt resentment at strictures which may have been made, though probably not always without justification, upon certain of its members, and attempted to retaliate by means of this law can only be the subject of surmise. But certain it is that they placed themselves in opposition to the doctrines enunciated by the forefathers upon which our free government was founded and in positive violation of the fundamental law.

The first ten amendments to the Constitution were intended as limitations upon the federal powers previously granted and this Court has always held them so to be.

Barron v. Baltimore, 7 Pet., 243.
Fox v. Ohio, 5 How., 410.
Mechanics & Traders Bank v. Thomas, 18 How., 384.
Twitchell v. Pennsylvania, 7 Wall., 321.
Presser v. Illinois, 116 U. S., 252.

In these cases it has been held by this Court that the prohibitions in these ten amendments were intended as limitations upon the federal government in favor of all citizens. The power vested in Congress to establish post offices and post roads and to make all laws which shall be "necessary and proper" for carrying into execution such power, became subject to the later specific amendatory provision that Congress shall make no laws abridging the freedom of the press. If this were not true this clause of the amendment would be valueless for the reason that only through its power over the postal system can Congress exercise control over the press. When, therefore, we read the Constitution by a comparison of Article I., Section VIII. with the clause of the First Amendment under discussion, we find that Congress shall have power to establish post offices and post roads and to make all laws necessary and proper for carrying into execution such power *provided* that in the exercise of such power

Congress shall make no law abridging the freedom of the press.

In this discussion it is of importance to keep in mind that the constitutional safeguard, which is contained in the First Amendment, and which is invoked by appellant, is not so much a limitation of the express powers of Congress as it is a restraint upon legislation as a means of exercising those powers. It is, to be exact, a restriction upon the incidental powers of Congress.

For a true understanding of the meaning of the phrase "freedom of the press" we must look to what it imported in England and in America at and just prior to the time of the adoption of the First Amendment, for it was the liberty of the press as it was then understood which is safeguarded. In this view, freedom of the press meant the right of free discussion by the press and the right of publishing and circulating a newspaper by any of the usual means or channels, without restraint, except the restraint which then existed under the law of libel.

Blackstone (4 Bl. Comm., side page 152), said that the liberty of the press consisted

> "in laying no previous restraint upon publication, and not in freedom from censure for a criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public. To forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

Freedom of the press as thus understood was the result of continuous struggle between the governing class, who sought to preserve their supremacy, and those who were governed and who sought to improve their condition, which culminated in England and America at about the time of the American Revolution.

At common law the freedom of the press was not well pro-

tected, and it was not until after many struggles that it was so far recognized in England as to permit the publication of current news without the permission of government censors (May, Constitutional History, C. 7, 9, 10). In our earlier colonial period we followed the practices of the mother country. The doctrine of the freedom of the press is still imperfectly acknowledged by some of the great nations under monarchical form of government and is only partially recognized in the fundamental laws of most of them. It is, however, the essential principle in a free government, a government by the people, and transcends every other in importance. We fought for the principle of freedom and by our adherence to this principle we have progressed in civilization and in the betterment of the condition of our citizens.

Freedom of the press as a principle made its first advance when censorship was abolished, which enabled a newspaper and individuals to print and publish their opinions without *previous restraint*. This, however, was only half of the battle for the freedom of the press. The next great step to be taken was to establish freedom from *subsequent punishment*, except for the publication of libelous matter. In the destruction of the censorship despotism received a fatal blow. Government and religion had held the arbitrary power of controlling the expression of public opinion, and the authority thus exerted in the form of the censorship, or previous restraint, prevented the printing of all matter which had not been passed and approved by the censor and provided for the search, seizure and destruction of unlicensed works and the press and equipment used in their production. The Crown originally arrogated to itself this power of control by forbidding everything from being printed except that which had been approved by its censor, and, as a corrollary, this resulted in the granting of exclusive privilege to print to its favored minions.

In 1695 a committee of the House of Commons was ap-

pointed to make a report as to what acts, about to expire, should be renewed. It reported in favor of the renewal of the act creating a censorship for the press. The House rejected this part of the report and, thus modified, it went to the House of Lords, which returned it to the House of Commons with an amendment to renew the censorship. The House of Commons refused to concur and in conference the House of Lords withdrew from their position. As Macauley said (Macauley's Works, Vol. IV., p. 124), this action of the British Parliament "accomplished more for liberty and civilization than the Great Charter, or the Bill of Rights."

The doctrine of previous restraint having fallen there still remained the question of subsequent punishment. This brought under consideration what could be punished after publication. The only offanse upon which subsequent punishment could be inflicted, as the common law then stood, was libel.

At about the period of the making of the Federal Constitution there were two views in England concerning libel in connection with the freedom of the press, that of Lord MANSFIELD in the case of The King v. Woodfall, 5 Burr., 2661, and that of Lord KENYON in Rex v. Cuthill, 27 St. Tr., 675. Lord MANSFIELD held that a man may print what he pleases without a license, but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the right to defend his innocence before a jury. Later, Lord CAMPBELL declared Lord MANSFIELD'S doctrine to have been "based upon a transparent fallacy." Lord KENYON'S view was that,

> "After all, the truth of the matter, as to the liberty of the press, is very simple when stripped of the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this: That a man may publish anything which twelve of his countrymen think is not blamable,

but he ought to be punished if he publishes what is blamable. This, in plain common sense, is the substance of all that has been said upon the subject."

Lord KENYON'S view was the conception then in the public mind which became crystallized in the bill of Mr. Fox passed unanimously in the House of Commons, and by a liberal majority in the House of Lords, in 1793, enacting that in public prosecutions while judges might express their opinions as to whether a given paper was a libel, yet the jury should have the right to pass upon the question in rendering their verdict. This took the entire power from a permanent magistracy and placed it in the hands of a jury selected by the people.

American statesmen of that time ardently believing in the principles of free government, detesting the doctrines of despotism and the exercise of arbitrary power by government, having before them the example of conflict over this question in England, sought to safeguard the freedom of the press not only from censorship and previous restraint, but from invasion by the legislative branch of the government.

Alexander Hamilton, than whom no abler exponent of the ideas of his times can be found, in the celebrated case of People v. Crosswell, 3 Johnson's N. Y. Cases, 337, 360, which was a prosecution for scandalous, malicious and seditious libel upon Thomas Jefferson, the President of the United States, sets forth, in the recapitulation of his brief, the principles as then understood in this country. He said :

"1. The liberty of the press consists in the right to publish with impunity truth, with good motives, for justifiable ends, though reflecting on government, magistracy, or individuals.

"2. That the allowance of this right is essential to the preservation of free government ; the disallowance of it fatal.

"3. That its abuse is to be guarded against, by sub-

jecting the exercise of it to the animadversion and control of the tribunals of justice ; but that this control cannot safely be intrusted to a permanent body of magistracy, and requires, the effectual co-operation of court and jury.

" 4. That to confine the jury to the mere question of publication, and the application of terms, without the right of inquiry into the intent or tendency, reserving to the court the exclusive right of pronouncing upon the construction, tendency, and intent of the alleged libel, is calculated to render nugatory the function of the jury ; enabling the court to make a libel of any writing whatsoever, the most innocent or commendable.

" 5. That it is the general rule of criminal law, that the intent constitutes the crime ; and that it is equally a general rule, that the intent, mind, or *quo animo*, is an inference of fact to be drawn by the jury."

Judge KENT, afterwards Chancellor, before whom this case came, gave his full approval to this statement of principles.

Freedom of the press as used in the First Amendment means that degree of liberty which permits, without previous restraint, the publication of any writing, without restriction as to any subsequent penalty, save that which may be found, on a regular trial by jury, to be such a publication as the law at that time condemned as libelous.

But it was not from the judicial or the executive branches of the government that the people feared an attack upon the freedom of the press. Their fear was that the legislative branch might by enactment violate this principle and it was for this reason that the Constitution was amended so as to prohibit Congress in express terms from enacting any law abridging the freedom of the press. By this wise amendment the people of the United States fixed a principle of freedom to endure for all time and any attempt to infringe upon it, no matter in what degree, must necessarily meet with instant and peremptory challenge.

The provisions of the Act in question practically re-establish the censorship in that they provide a *previous restraint* by demanding that unless the class of newspapers, magazines and periodicals indicated *first* file certain required statements as to their private affairs they shall be denied the privileges of the mail, the chief medium of their circulation, to all intents and purposes suppressing them through a government functionary, who is charged with the duty of excluding them; and the provisions of the Act also provide for a *subsequent punishment* by providing a severe penalty for not marking certain editorial or reading matter with the word "advertisement," although such comment or matter is neither libelous, nor contrary to the public morals, the public health, or the public welfare, thus, by these two provisions, distinctly abridging the freedom of the press as prohibited by the First Amendment.

There can be no doubt but that Congress in the exercise of the police power has the right to exclude by appropriate legislation all articles or matter from the mails which is contrary to public morals and such exclusion is not an abridgement of the freedom of the press.

Ex parte Jackson, 96 U. S., 727.
In re Rapier, 143 U. S., 110.

But let us clearly understand to what extent the exercise of the police power by Congress in relation to the mails has been held to be authorized. In *Ex parte* Jackson, at p. 736, Mr. Justice FIELD, in delivering the opinion of this Court, said:

> "In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people, but to refuse its facilities for the distribution of matter deemed injurious to the public morals. Thus, by the act of March 3, 1873, Congress declared 'that

no obscene, lewd or lascivious book, pamphlet, picture, paper, print or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature, nor any written or printed card, circular, book, pamphlet, advertisement or notice of any kind, giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made, nor any letter upon the envelope of which, or postal-card upon which, indecent or scurrilous epithets may be written or printed, shall be carried in the mail; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any of the hereinbefore mentioned articles or things * * * shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall, for every offence, be fined not less than $100, nor more than $5,000, or imprisonment at hard labor not less than one year nor more than ten years, or both, in the discretion of the judge.'

"All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people."

In the course of the opinion, Mr. Justice FIELD, on page 732, said, concerning the power of Congress to regulate the postal system:

"The difficulty attending the subject arises not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, *but from the necessity of enforcing them consistently with the rights reserved to the people, of far greater importance than the transportation of the mail.*" (Italics ours.)

And again on page 733:

> "*Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation the publication would be of little value.*" (Italics ours.)

This decision met with the approval of this Court in the Rapier case.

It is therefore clear that Congress can exercise the police power so as to prevent the use of the mail for any immoral or demoralizing purpose, but it is equally clear that unless a newspaper, magazine or periodical comes within this category by the printing of matter condemned as harmful to the people, Congress must not deny it the use of the mail. Neither can Congress dictate and control what shall or shall not be published in a newspaper, magazine or periodical under a penalty for non-compliance of arrest and a fine upon conviction. The rights reserved to the people are of far greater importance than the transportation of the mail and Congress must not attempt through its power to regulate the mail to interfere in any manner with the freedom of the press.

But freedom of the press at the time of the adoption of the First Amendment imported the right of free discussion in print, without any restraint, except that which was imposed by the law of libel as it then existed in the jurisprudence of England and America. The exclusion from the mail of anything injurious to the public health, the public morals or the public welfare at the present time is not a restraint upon the freedom of the press, but can Congress go to the point of making a law which interferes with the liberty of printing and the liberty of circulating, and thus prevent free discussion? If this power exists what is to prevent Congress from further extending its power by the denial

of the privileges of the mail or the imposition of a severe penalty with respect to any newspapers owned or financially influenced by individuals advocating certain public questions or the policies of political parties? Certainly no one would attempt to uphold the right of Congress to so legislate and yet this legistation is just as drastic and just as far reaching as that suggested.

Here Congress not only imposes penalties for failure to furnish the government with information as to the affairs of the press, but it commands the press on certain designated dates to publish certain matter and at all other times to label other matters "advertisement," thus dictating certain things to be published and when and how they shall be published. This, if upheld, re-establishes a censorship and control over the press that is directly contrary to the Constitution.

In 1835 President Jackson, in his annual message, discussed the attempted circulation of inflammatory appeals to slaves in newspapers and other publications, tending to stimulate them to an insurrection, and suggested to Congress the advisability of enacting a law for the suppression of such "incendiary publications." The matter was discussed at length in the Senate upon the theory of the power of Congress to exclude such publications from the mail. The question was referred to a committee, of which Mr. Calhoun was chairman. He presented an elaborate report, in which he contended that the power was in the States, and not in Congress, to determine what is and what is not calculated to disturb their security. While condemning in the strongest terms the circulation of such publications, he insisted that Congress had no power to pass a law prohibiting their transmission through the mail, on the ground that it would abridge the freedom of the press. The prevailing opinion of the Senate was in favor of his report and against the existence of such a power in Congress.

It seems from this that in the earlier days of our Nation when Congress was in closer intellectual contact with the

theories and doctrines of those who framed the Constitution and its amendments, they did not approve of a restraint upon free discussion in the press even though it went to the extent of "incendiary publications," as it might abridge the freedom of the press. Times have changed and so have the ideas of legislatures, but this principle of the First Amendment is immutable.

The real underlying purpose of this legislation can only be the subject of guess-work and this can only lead to the supposition that Congress wished to compel a certain class of publications to disclose the names of the holders of their stocks, bonds, mortgages and other securities or to show that they received a valuable compensation from some person for the printing of some of their reading matter, on the possibility that the influence of such persons might be such as to cause the expression of a biased opinion by the publications in question. This is a very far drawn supposition and however desirable it may be for the readers of a publication to know whether it speaks impartially or not, it is not within the power of Congress to control the press of the country in this respect and to attempt to do so is an interference with free discussion, for even the holder of a corporate obligation is entitled to be heard in the policy of the corporation in which he is interested. Every newspaper, magazine or periodical has the right to express its opinion no matter who owns it or influences it and to deny it this right, either directly, or indirectly, by the use of a governmental department or by subjecting it to a heavy penalty, is in contravention of the Constitution.

Some justification for the Act might be said to exist if the purpose of the filing was to require information to be given to the Postmaster to afford a basis for fixing rates, or classifying matter, but such is not here the case. Matter is now classified and rated according to existing laws and

regulations which this Act in nowise affects and the neglect of the publisher to file the information does not merely deprive him of his right to send his publication as second class matter and of the benefits of the second class rate, it deprives him absolutely of the privileges of the mail for his publication. Certainly this is not necessary, nor appropriately designed, for the purpose of aiding the regulation of the mails, the carrying of mail matter or the fixing of rates. Any other purpose attributed to the Act is, as previously pointed out, a matter of speculation, and yet such an Act should not properly be a subject of speculation. All that can be done is to read it as it stands and apply the principles involved to determine whether it violates the Constitution. When this is done we think it clearly appears that the Act establishes a governmental control over newspaper publishers and dictates to them what shall or shall not be published and the manner, form and time of publishing. In other words, Congress in plain language provides that matter inherently proper and mailable shall be unmailable not on account of any inherent defect, but solely because the publisher may refuse or neglect to advise the public of certain of his private matters as to which Congress seems to desire the public to be informed. This is not regulation, but paternalism and a direct and positive abridgement of the freedom of the press.

IV.

The Act is illegal and void and beyond the power of Congress to enact, being an usurpation by Congress of powers expressly reserved to the States of the United States, in that it is legislation affecting matters with which the several States alone have the right to treat by legislation or otherwise.

The provision of the law which seeks to compel the publisher of a newspaper, magazine or periodical to mark any editorial or reading matter for which compensation is paid, accepted or promised, with the word "advertisement," under penalty for non-compliance of arrest and fine, is a clear usurpation by Congress of powers expressly reserved to the States. In clear and unequivocal language the Act provides that certain acts, when and wherever committed, whether within the confines of a State or in Federal territory, whether within or without the jurisdiction of the Federal government, shall be a crime punishable by fine. Congress is without power to enact any such legislation, for power in such matters is expressly reserved to the States.

In discussing the powers reserved to the States it is well to consider the circumstances attending the adoption of the first ten amendments, in order to give a true understanding of the powers reserved as conceived at the time of the adoption of the amendments. On June 8th, 1789, James Madison introduced in the House of Representatives a series of propositions, covering matters which had been promised by the supporters of the Constitution, as an inducement to its adoption, offering certain desired guarantees. He deemed it his duty to call upon Congress to remove by a wise exercise of the

power of amendment the honest doubts and fears of the people as to the security of their rights under the new federal system.

> "It appears to me," he said, "that this House is bound, by every motive of prudence, not to let their first session pass over, without proposing to the state legislatures something to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States as it has been found to be to a majority of them. It will be desirable to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and freely bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be engrafted so as to give satisfaction to the doubting part of our fellow citizens, the friends of the Federal Government, by yielding them, will evince that spirit of deference and concession for which they have been hitherto distinguished."

As is said by Rives in "The Life and Times of James Madison," vol. 2, pages 38–46:

> "The amendments proposed by Mr. Madison were, therefore, mainly in the nature of a Declaration of Rights, placing the freedom of speech, the freedom of the press, freedom of religion, the security of property, personal liberty, trial by jury, and in general every right and power of the people not delegated or surrendered, under the ægis of the Constitution, and by an express interdiction beyond the reach of the Government."

The amendments in conformity with the proposals of Mr. Madison were submitted to the legislatures of the several

States by action of the First Congress on September 25th, 1789, prefacing them with the preamble:

> "The conventions of a number of the states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution * * *."

By this declaration it was clearly stated that the intention of the amendments was to prevent misconstruction or abuse of powers by declaratory and restrictive clauses of limitation.

There are numerous authorities, unnecessary to quote, to the effect that the first ten amendments are to be regarded as limitations on the powers of the Federal Government and not upon the powers of the States.

As was said by Mr. Chief Justice MARSHALL in delivering the opinion of this Court in Barron v. Mayor and City Council of Baltimore, 7 Pet., 243, 247:

> "The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

And again at page 250:

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government —not against those of the local governments."
>
> "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states."

What can be more specific than the language of the Tenth Amendment, which provides,

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Unless the right of Congress to pass this provision of the Act in question can be clearly shown under the powers delegated to the United States by the Constitution, it comes within the reservation. It certainly does not come within the express power to tax nor to regulate commerce, for it imposes no tax and relates equally to papers that are the subject of intrastate commerce alone; and it cannot come within the power to establish post offices and post roads, for it is not in aid or assistance in the operation of the postal establishment, nor in the regulation of the mails or the carriage of mail matter. It

does not come within the police power to protect the public health, the public morals or the public welfare, for the matter concerned is inherently decent and proper. There is, therefore, no power in Congress express, incidental or implied for the making of such a law, and, moreover, the act it seeks to make an offense, if it be an offense at all, is not an offense against the United States.

In the case of United States v. Fox, 95 U. S., 670, the proposition that an act committed within a State cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, is plainly stated. Mr. Justice FIELD in delivering the opinion of this Court, said, on page 672:

> "Any act committed with a view of evading the legislation of Congress *passed in the execution of any of its powers*, or of fraudulently securing the benefit of such legislation may properly be made an offense against the United States. *But an act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate.*" (Italics ours.)

This provision of the Act complained of is opposed to the proper dignity and sovereignty of State governments. The Constitution of the United States has been granted limited powers, which are clearly defined, and the legislative branch of the government within the scope of these powers is restrained by a rigid bill of rights for the protection of citizens from oppression. It cannot be gainsaid that the common interest of the people of this country requires that both State and National governments should be allowed without jealous interference on either side to exercise all the powers which respectively belong to them, but both State rights and the

rights of the United States should be equally respected, for both are essential to the preservation of our liberties and the perpetuity of our institutions, and the Federal legislature should not be permitted to overstep the bounds of its powers as granted by the States.

There can be no doubt of the right of States of the Union to control their purely internal affairs and in so doing they exercise powers expressly reserved from the National government. To legislate as to a crime committed within a State is purely a function of a State legislature. If there be an offense in not plainly marking editorial or other reading matter for which compensation is paid with the word "advertisement," it must come within the jurisdiction of the State where the offense is committed and then only by an exercise of the police powers of such State.

Among the powers reserved to the several States is their police power—that inherent and necessary power essential to the very existence of their civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime. As Mr. Justice STORY said in delivering the opinion of this Court, in Prigg v. Pennsylvania, 16 Pet., 539, 625, the police power belonging to the States in virtue of their general sovereignty, "extends over all subjects within the territorial limits of the states; and never has been conceded to the United States." This is well illustrated by adjudications that a statute prohibiting the sale of illuminating oils below a certain fire test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States, as for example, the Federal district and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute even as to oils manufactured under letters patent from the United States.

In the case of United States v. De Witt, 9 Wall., 41, this question was determined. The 29th Section of the Internal

Revenue Act of March 2nd, 1867, made it a misdemeanor, punishable by a fine and imprisonment, to mix for sale naptha and illuminating oils, or to sell or offer for sale oil made of petroleum for illuminating purposes inflammable at less temperature or fire-test than 110 degrees Fahrenheit.

This provision was interjected into an act imposing internal revenue duties in much the same manner as the provision complained of has been interjected into the Act providing appropriation of moneys for the maintenance of the postal establishment.

Mr. Chief Justice CHASE, in delivering the opinion of the Court said, at pages 43, 44 and 45 :

> "The questions certified resolve themselves into this : Has Congress power, under the Constitution, to prohibit trade within the limits of a State ?
>
> "That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms ; and as a virtual denial of any power to interfere with the internal trade and business of the separate States ; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.
>
> "It has been urged in argument that the provision under which this indictment was framed is within this exception ; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles ; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed ; while, in the case before us,

no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

"This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

"There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this Court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

See, also,

United States v. Press Pub. Co., 219 U. S., 1.
James v. Bowman, 190 U. S., 127.
Baldwin v. Franks, 120 U. S., 678.
Civil Rights Cases, 109 U. S., 3.
United States v. Harris, 106 U. S., 629.
United States v. Reese, 92 U. S., 214.

The police power as we have said comprehends all measures for the protection of the citizen of the State from disorder, disease, poverty and crime. This power being necessary to the maintenance of the authority of local government and to the safety and welfare of the people, is inalienable. As was said by Mr. Chief Justice WAITE, in Stone v. Mississippi, 101 U. S., 814, 819,

> " No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

The provision of the Act complained of although inserted in the postal appropriations act has no relevancy thereto. There is no penalty of denial of the privileges of the mail for not marking the editorial or reading matter referred to with the word " advertisement." Under this provision a newspaper, magazine or periodical which does not make use of the mails, if such a one could be found, is nevertheless liable. It is also liable even if no copy of its paper containing the prohibited matter be sold or delivered on Federal territory or beyond the territorial limits of the State of its domicile and operation. It is clear that Congress in this provision has overreached itself in an attempt to exercise a control over the press of the country, for the legislation in question is entirely without and beyond the power delegated by the Constitution of the United States.

V.

The provisions of the Act being unconstitutional, the decree of the District Court should be reversed.

Respectfully submitted,

ROBERT C. MORRIS,

GUTHRIE B. PLANTE,

Counsel for Appellant.

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CONGRESS HAS NOT ABRIDGED THE FREEDOM OF THE PRESS.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

NOS. 818 AND 819.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN, *Appellant,*

v.

FRANK H. HITCHCOCK, AS POSTMASTER GENERAL OF THE UNITED STATES; GEORGE W. WICKERSHAM, AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL., *Appellees.*

LEWIS PUBLISHING COMPANY, *Appellant,*

v.

EDWARD M. MORGAN, AS POSTMASTER OF THE UNITED STATES OF AMERICA IN AND FOR NEW YORK CITY, BOROUGH OF MANHATTAN, *Appellee.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

These two cases (No. 818, hereinafter called the *Journal of Commerce* case, and No. 819, hereinafter called the *Morning Telegraph* case), while based upon slightly different theories as to the *construction* of the "newspaper publicity" feature of the Post Office

Appropriation Act, approved August 24, 1912, nevertheless attack its *constitutionality* upon substantially the same grounds. (37 Stat. at L. 539, 553.)

The *Journal of Commerce* seeks (1) to enjoin the Postmaster General and the New York postmaster because it construes the act to mean that it will be excluded from the mails if it fails to comply with the provision about publishing the name of the editors, owners, etc., and (2) to enjoin the Attorney General and the United States district attorney from prosecuting it because, as it construes the act, it will be prosecuted criminally (though not excluded from the mails) if it publishes any editorial or reading matter for which it receives compensation without marking it "advertisement." (Rec. No. 818, p. 8; Cf. XV and XVI.)

The *Morning Telegraph* sues no one but the postmaster of New York, and merely seeks to enjoin him from excluding it from the mails, because, on the other hand, it construes the act to mean that all newspapers, etc., are to be excluded from the mails unless they (1) publish the names of their editors, etc., *and also* (2) mark as an "advertisement" all matter for which they receive compensation. (Rec. No. 819, p. 6.)

We are thus met at the very threshold of the case with a question, not so much of *interpretation* (for the words are plain and unambiguous), but of *construction;* that is to say, we must determine the relation and effect of the different portions of the section to and upon each other.

It is elementary that every reasonable construction of a statute must be resorted to, even though such construction be not the most natural or obvious one, in order to save a statute from unconstitutionality.

The very essence of construction is the extension of the meaning of a statute beyond its letter; or, as said in *United States* v. *Farenholt*, 206 U. S. 229: "Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."

For example, it may be that Congress has no power to prohibit a newspaper from (or to punish it for) publishing this or that, or requiring it to mark any of its articles "advertisement"; and part of the present statute is, in form, possibly open to the objection just suggested, but when the general legislative intent is considered that objection can be eliminated by a very reasonable construction of the act, to wit, that it only means that no newspaper shall use a certain highly favored low postage rate unless it conforms to such regulations.

THE PROPER CONSTRUCTION OF THE ACT.

The United States contends that the proper construction of the act should be as follows:

I. That no newspaper, magazine, etc., shall use the second-class mail privilege unless it shall

(*a*) File with the Postmaster General and postmaster, and publish in its second issue

thereafter, the required statement giving the names of its editor, publisher, bondholders, etc., and its circulation; and

(*b*) Mark as an "advertisement" anything for the publication of which it receives compensation,

within ten days after receiving notice, by registered mail, of its failure to do those things.

II. That any editor or publisher who, after receiving such notice, uses the second-class mail privilege for the transmission of his publication without marking such paid-for articles "advertisement" shall be fined from $50 to $500.

III. That the foregoing provisions shall not apply to religious, fraternal, temperance, and scientific or other similar publications.

So construed, the entire section is valid.

If, however, it should be held that the requirement that newspapers should mark paid-for articles "advertisement" was not intended as a mere condition precedent to the use of the mails, but was an independent and direct requirement, and that it was, therefore, unconstitutional either as an abridgment of the Freedom of the Press in violation of the First Amendment or as an invasion of the powers reserved to the States under the Eleventh Amendment, then and in such event the United States further contends—

IV. That the "advertisement" clause so construed is separable from the balance of the section,

and may be declared void without affecting the validity of the prior provision denying the use of the mails unless the statement be filed giving the names of the editor, publisher, etc., which latter provision can still stand alone.

The Post Office Appropriation Act.

Section 2 of the Act of August 24, 1912, 37 Stat 553, 554, reads as follows:

Sec. 2. * * *

That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is *entered*, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of *this paragraph* shall not apply to religious, fraternal,

temperance, and scientific, or other similar publications: *Provided further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be *denied the privileges of the mail* if it shall fail to comply with the provisions of *this paragraph* within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any *such* newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500).[1]

[1] For brevity, we will use the term "newspaper" to include "newspaper, magazine, periodical or other publication"; and we will use the term "editor" to include "editor and managing editor, publisher, business managers and owners."

FIRST POINT.

The statute means that in order to obtain the low, second-class postal rate all newspapers must comply with two requirements, to wit:

A. File with the Post Office Department and publish in the paper the name of the editor, and

B. Mark as an "advertisement" any article for the publication of which the newspaper receives compensation;

and, in default of so complying, shall be denied the second-class postal rate.

The statute is inartificially drawn and might have readily expressed this idea in a more apt form; but the legislative history of the act shows that such was clearly the intent of Congress.

Independently of the intent of Congress, as reflected in such history, the statute can, without undue violence to its language, be so construed.

I.

The intent of Congress as deduced from the legislative history of the act.

1. *As originally passed by the House.* One *typographical* paragraph[1] made it unlawful to send (as second-class mail) any newspapers through the mails unless such newspapers

(1) showed the names of the editor; and

(2) Marked as "advertisement" any article for which any consideration was received or

[1] For convenience, we shall use the term "*typographical*" paragraph to indicate that division of printed matter formed by beginning on a new line and leaving a small blank space before the first letter; the term "*literary*" paragraph will indicate that portion of printed matter relating to the same general subject matter, whether composed of one or more sentences or one or more "*typographical*" paragraphs.

> promised; and signed the name of the person in whose interest it was published (hereafter called the "advertisement" clause);

and imposed a fine from $100 to $1,000 for sending anything through the mails in violation of those provisions, but exempted certain publications in these words:

> *Provided*, That nothing *in this paragraph* contained shall apply to or include periodical publications published by or under the auspices of fraternal or benevolent societies or orders or trades-unions.

As the "typographical" and "literary" paragraph were one and the same thing, there could be no doubt as to what the words "*in this paragraph*" referred to; and, therefore, as originally passed, fraternal, etc., publications were entirely exempted from the operation of both the "advertisement" clause and the necessity of printing the name of the editor.

2. *Report of the Senate committee.* The Senate committee struck out the House provision, and in its report to the Senate offered a substitute, split into two typographical paragraphs.

The first paragraph (instead of requiring *each issue* to contain the name of the editor) provided for filing a statement of the name of the editor, and for its *semiannual* publication only; and in other respects lessened the requirements, and denied the use of the mails to any publication failing "to comply with any provision of this paragraph." The second para-

graph (omitting the requirement that paid-for articles should be *signed* by the persons in whose interest they were published) merely required paid-for articles to be marked "advertisement," and reduced the penalty to a fine of $50 to $100.

It is thus seen that while the House bill provided in apt form that it should be unlawful to deposit in the mails as second-class mail any publication unless it conformed to the requirements therein set out, the Senate substitute changed the form of the bill.

By the first typographical paragraph it required certain things of newspapers, and then provided for their exclusion from the mails if they failed "to comply with any provision of this paragraph," [thereby leaving open for judicial construction whether the words "*this* paragraph" refer to that "typographical" paragraph, or to it and the succeeding one, which, taken together, constitute one *literary* paragraph].

By a second typographical paragraph it required paid-for articles to be marked "advertisement," with a fine affixed for a failure to do so, but with no direct statement as to the exclusion from the mails, unless, by construction, the provision in the preceding paragraph as to "*this paragraph*" should be deemed to refer to both "typographical" paragraphs as constituting one "literary" paragraph.

In altering its form the Senate committee had no intention of doing anything more than to soften some of the rigid requirements of the House bill and to render its administration more practicable, but

without making any change either in the principle to be enforced or in the source from which Congress derived its constitutional power to enact the bill.

The Senate committee reported the following indorsement on the House bill (Information print, p. 63):

> "*Disagreed to.* Committee thoroughly believed in the principle sought to be enforced, but on investigation found it impracticable of administration and therefore offered as an amendment *paragraph* 133, which in committee's opinion accomplishes the end sought under the House provision and furnishes a practical method for such accomplishment, with less expense to the parties affected by the provision."

The Senate committee used the word "paragraph," not in the typographical sense but as relating to the subject matter under discussion, to wit, the "literary" sense, as is shown by its use of the word "paragraph" (singular) in referring to its amendment (No. 133), which was divided into *two* "typographical" paragraphs, but it spoke of it as "paragraph 133."

This is further shown by the report of the Senate committee (No. 955), where it is said (p. 24):

> PUBLICITY OF OWNERSHIP AND CONTROL OF NEWSPAPERS AND MAGAZINES.
>
> The second paragraph of section 2 of the bill as it was passed by the House prohibits the mailing of newspapers, magazines, or other publications unless there be printed

therein the names and addresses of the editors and owners and of the owners of stock, bonds, or other securities to the amount of $550 or more, daily papers being required to publish this list only once a week. *This paragraph* also requires that editorial or reading matter for which compensation is received shall be plainly marked "advertisement" or signed by the name of the person in whose interest it is published.

With the purpose of *this paragraph* the Senate committee is in hearty accord, as also, we believe, are a vast majority of the newspaper and periodical publishers of the country.

The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history. It is a common belief that many periodicals are secretly owned or controlled, and that in reading such papers the public is deceived through ignorance of the interests the publication represents. We believe that, since the general public bears a large portion of the expense of distribution of second-class matter and since these publications wield a large influence because of their special concessions in the mails, it is not only equitable but highly desirable that the public should know the individuals who own or control them.

But we believe that the requirements of *the paragraph* as passed by the House are needlessly burdensome, hence we recommend the *substitution* of *a paragraph* requiring that the list of owners, stockholders, or security holders be filed with the local postmaster and

> the Postmaster General semiannually and as frequently printed in an issue of the publication.

The committee thus declared its "hearty accord" with all the provisions of the House bill (including the "advertisement" clause), but, thinking they were "needlessly burdensome," recommended the substitution of a paragraph (singular) [which consisted, however, of *two* typographical paragraphs] limiting the publication of the names of the editor, owner, etc., to twice a year. Clearly, the committee, while changing somewhat the form of the bill, did not intend thereby to impair its constitutionality by abandoning the exercise of the only power through which it could accomplish the result sought, but it only intended, as it aptly said, to furnish "a practical method with less expense to the parties affected."

3. *As finally passed by Congress.* After conference, the House and Senate concurred and enacted the measure in the form proposed by the Senate committee with a few further unimportant amendments, the most important being the insertion in the first typographical paragraph of the following clause:

> *Provided*, That the provisions of *this paragraph* shall not apply to religious, fraternal, temperance, and scientific, or other similar publications.

By exempting religious, fraternal, scientific, etc., publications from "the provisions of *this* paragraph" it clearly meant not merely the typographical paragraph relating to the semiannual publication of the

names of the editor, but it also intended to exempt those favored publications from the provisions of the succeeding typographical paragraph as to marking paid-for articles "advertisement." In short, here again the term "*this paragraph*" referred to the *literary* paragraph and not to the mere typographical paragraph in which the exempting clause was inserted.[1]

The Government, therefore, insists that the legislative history shows that Congress in its final enactment of the bill had the same intent that the House had in originally passing it, namely, merely to exclude from the second-class mail privileges all publications that did not comply with the requirements laid down in the act. The changes in the bill all related to the terms of the requirements, and were not intended to affect the broad principle that Congress (pursuant to its power to decide what should be carried by its mails) was limiting the use of the second-class mail privileges to those newspapers that would comply with certain regulations which Congress felt it wise to impose as conditions upon such use.

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[1] As originally passed by the House, the bill provided that "nothing in this paragraph" (thereby including both the clause as to publishing the name of the editor and the "advertisement" clause) should apply to fraternal, benevolent, or trades-union publications. The Senate committee struck out that exemption and made the act apply to *all* publications. The Senate and House restored the exemption clause in somewhat broader language and clearly intended to exempt the specified publications from *all* the provisions of the act. They could not have meant to exempt them only from the necessity of filing the statement, etc., as required by "this [typographical] paragraph," and leave them subject to the "advertisement" feature of the next paragraph. This again indicates that throughout the act Congress used the word "paragraph" in its *literary* and not in its mere "typographical" sense.

II.

The reasonable construction of the language used.

Nothing is better known than that many, very many, statutes are drawn and passed with the most obvious evidences of haste, casual consideration, lack of knowledge of constitutional principles, ignorance of many of the facts to which the statute will apply or of the consequences which will flow from its operation in quarters its makers never knew existed.

If, therefore, the language used in a statute were always given its plain, simple, obvious meaning and so applied to all the facts to which it was applicable, one or more of three results would frequently follow, to wit: Either it would be unconstitutional or it would amount to nothing and accomplish nothing, or it would achieve results so absurd or burdensome as to demonstrate that no such intention could have prompted its passage. And so long as our laws are passed in the hasty and unconsidered way that they are, just so long will one of the most difficult tasks of our courts be to construe them, and thereby to give some effect to them without transgressing constitutional restrictions, and yet accomplish as near as may be that which its authors intended.

It is no easy task. It is never easy to know what another intended save by the language used; and yet if that language implies the exercise of a power not possessed, or leads to results so absurd or unreasonable as to create the belief that no such effect was intended, it becomes the duty of the court not

to adhere to the letter and destroy the spirit, nor, on the other hand, to reject it all as meaningless or violative of constitutional restrictions, but to strive as best it may to give such a meaning as can fairly and reasonably be done without substituting its own will for that of the authors and yet give effect to the instrument.

With these principles in mind let us see what the language of the act may fairly be said to mean.

1. *The act only applies to newspapers using, or desiring to use, the second-class mail privileges.* That the statute did not refer to all publications generally, but only (1) to those *using the mails* and (2) *to their use thereof* is thus shown: (*a*) the title of the act is "for the service of the *Post Office* Department;" (*b*) the whole act relates to the *use of the mails* and the operation of the postal service; (*c*) the particular paragraph requires the statement to be filed with "the postmaster at the office at which said publication is *entered*," which is meaningless except in relation to the use by the newspaper of the mails; (*d*) one sentence provides that the publication shall be "denied the privileges of the *mail*;" and (*e*) even the "advertisement" clause refers only to "any *such* newspaper," etc., *i. e.*, newspaper to which the previous paragraph applies. In short, the general subject of the statute is *the use of the mails* by newspapers, etc., and that idea should be borne in mind in construing the language of particular sentences. *Pollard* v. *Bailey*, 20 Wall. 520, 525; *Blair* v. *Chicago*, 201 U. S. 400, 463.

Furthermore, the statute only applies to publications in so far as they *use the second-class mail privilege* and does not refer to their use of the mails generally. It provides that the editor shall file a statement giving the names and addresses of editor, publisher, owner, etc.,

> "with * * * the postmaster at the office at which said publication is *entered*." [1]

It follows, therefore, that the present statute does not even attempt to regulate the use of the mails generally, but only to the extent that publications have been "entered" at a post office in order to obtain the low second-class postage rate of one cent per

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[1] While the statute in its opening language applies to *every* newspaper, etc., the succeeding words qualify this generality and limit the application of the language to such newspapers as are "*entered*." As used in reference to the postal system, "entered" is a technical word with a distinct and long-established meaning. It refers to the granting of second-class postage rates to newspapers and periodicals. It has *no reference whatever* to first, third, or fourth class mail matter.

The "Postal Laws and Regulations" provide that when a publication is admitted to the second-class mail privilege it must print on each issue "Entered ——— at the post office at ——— as second-class matter," etc. (sec. 442); and the word "entered" is never used except in relation to the admission to second-class mail privileges. (See secs. 438, 440, 442, 443, 445, 452, 456, 460, 467.)

In this very statute Congress (1) made an appropriation for 110,000 copies of the "Postal Laws and Regulations," (2) amended section 233 thereof, and (3) used the term "entered" with reference to admitting a new class of publications to second-class mail privileges (37 Stat. at L., 541, 545, 551); thus distinctly recognizing the force and effect of the "Postal Laws and Regulations" in which the technical meaning of the term "entered" is given and then adopting and using the term in its technical sense.

Again, the report of the Senate committee (p. 10, *supra*) shows that this legislation was expressly based on the idea that papers which received the low second-class postage rate owed a duty to the public which bore the expense to give publicity to their ownership, circulation, etc., which would have no application to publications not seeking the low second-class rates but paying the full compensatory third or fourth class rates.

pound; that Congress has dealt only with those publications which apply for and receive the second-class mail privileges; that it only undertook to deny the use of the mails to such second-class publications as refused to comply with certain regulations it deemed wise to impose; and that even of those it excepted religious, fraternal, temperance, scientific, etc., publications.

Although, in form, the first "typographical" paragraph requires each editor to file the required statement, and denies the use of the mails to any publication that fails to do so, it seems too clear for argument that the statute will be construed to mean simply that publications will be denied the use of the mails *unless* they file the statement, etc.; that is to say, as a condition precedent to the use of the mails the publications must conform to such regulation.

It will not be construed as applying to newspapers that do not use the mails at all, but reach their readers by some other mode of circulation; nor does it apply even to those publications using the mails further than to provide that *unless* they file the statement, etc., they shall be excluded from using the *second-class* privileges established by Congress.

2. *The words "this paragraph" refer to the whole subject of newspaper regulation.* The statute says:

> Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of *this paragraph* within ten days after notice by registered letter of such failure.

The critical question in the construction of this statute is, Do the words "this paragraph" refer to the mere *typographical* paragraph in which they occur, or do they refer to the entire literary paragraph (composed of *two* typographical paragraphs), which deals with the subject of newspaper regulations?

The Century Dictionary thus defines a "paragraph":

> 1. A distinct part of a discourse or writing relating to a particular point, whether consisting of one sentence or of many sentences: in this sense the word does not necessarily imply the division defined below.
>
> 2. A division of written or printed matter, usually formed by beginning on a new line, and by leaving a small blank space before the first letter.

The legislative history above reviewed (p. 7–13, *supra*) shows that Congress used the word "paragraph," not in the narrower sense of limiting it to the identical *typographical* paragraph in which it appears, but in the broader sense of that part of section 2 relating to the requirements imposed upon newspapers, etc., as distinct from the earlier part of section 2, forbidding contracts for postal supplies with anyone in a combination to raise prices, etc.

This is further shown by a consideration of the same words "this paragraph" where they appear in the middle of the first typographical paragraph, as follows:

> Provided, That the provisions of *this paragraph* shall not apply to religious, fraternal,

> temperance, and scientific, or other similar publications.

Congress certainly thereby intended to exempt those special publications from all the requirements it was imposing; and the "this paragraph" referred to was the *whole* paragraph (including both the "filing" and the "advertisement" portions) and not merely the one "typographical" paragraph in which the words occur.

Congress never intended to exempt religious, etc., publications from the "filing" feature and yet leave them covered by the "advertisement" paragraph.

Furthermore, the "advertisement" paragraph begins with these words:

> That all editorial or other reading matter published in any *such* newspaper, magazine, or periodical, etc.—

and the use of the word "such" directly connects the two paragraphs by *identifying* the subject matter of the "advertisement" paragraph, to wit, only *such* newspapers, magazines, etc., as are *entered* at the post office as second-class mail.

3. *The purpose of the special penalty for violating the "advertisement" clause.*—The purpose of the special penalty of a fine of from $50 to $500 for a violation of the "advertisement" paragraph was this: The Post Office Department would always know in advance whether a newspaper had filed the statement, etc., required by the first paragraph, and consequently could enforce the exclusion from the mails

with promptness and complete accuracy. But there would be no way for the Post Office Department to know in advance whether *all* paid-for articles had been marked "advertisement" and it might not learn of a violation until months afterwards, and in the meantime the paper had received the full use of the mails. It is doubtful whether you could to-day exclude from the mails a newspaper now fully complying with the law on account of a failure to comply six months ago. Therefore the additional penalty of a fine was imposed for violating the "advertisement" paragraph; and in that way you could punish any paper that had used the mails for carrying paid-for articles that were not marked "advertisement."

4. *The true construction that should be adopted.*—If the foregoing argument has been successful it has established, *First*, That Congress did not attempt to regulate *all* newspapers, magazines, etc., but only those that used the second-class mail privileges; *Second*, That Congress prescribed certain things which those publications must do in order to continue the use of the second-class privileges; *Third*, That Congress denied the use of the second-class privileges only to such publications as, after ten days' notice, still refused to comply therewith; and, *Fourth*, That Congress prescribed a moderate fine for any publication which (while complying with the first paragraph and thereby securing the continued use of the mails) inserted paid-for articles without marking them "advertisement."

In substance and effect the statute merely prescribes certain additional conditions to be complied with before newspapers may be admitted to the second-class mail privileges.

III.

Any other construction might invalidate the statute.

Very probably Congress has no power to regulate the press or to say what shall or what shall not go into newspapers, pamphlets, etc.; or to require them to print the names of their bondholders or circulation; or to prescribe how they shall label their articles. If the statute be construed (and especially the "advertisement" paragraph) as attempting to do those things, it may possibly be void.

The construction we have offered is one of which the language is easily susceptible, and which will (as we shall now endeavor to demonstrate) remove all constitutional objections.

Therefore, it should be adopted as the correct construction.

SECOND POINT.

Under the power to establish post offices and post roads Congress has the absolute right to determine what matter may be carried in and what matter may be excluded from the mails, and it may declare the conditions on which it will carry articles and that a given class of matter (newspapers, etc.) shall not be carried at the second-class rate unless such matter conforms to every requirement Congress may prescribe.

The Constitution provides (Art. I, sec. 8):

> The Congress shall have power * * * to establish post offices and post roads.

Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employees, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money-order system, by which more than a half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcels post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and criminal schemes impossible to be reached in any other way.

As an incident to that vast development Congress has, and of necessity must have, absolute power to say what it will exclude from and what it will carry in the mails and the terms, conditions, and postal rates on which it will carry mail matter.

1. Accordingly Congress has absolutely excluded from the mails intoxicating liquors, poisons, bad-smelling, explosive, or inflammable articles, live or dead animals, obscene matter, lottery advertisements or letters, threatening or libellous matter on envelopes, etc.; and on many other articles special conditions of admission have been annexed.

2. Under its plenary power, Congress has classified both the matter sent and persons sending it, according to such various bases of classification as to it seemed best, a brief notice of which will be instructive.

System of Postal Classification.[1]

First-class: Letters and written matter at 2 cents an ounce (or probably 80 cents a pound when underweight letters are considered); and postal cards at one cent each; from which a *profit* of about *seventy million dollars* a year is derived.

Second-class: Newspapers and periodicals at 1 cent a pound, carried at a *loss* of about *seventy* millions of dollars per year.

Third-class: Books and pamphlets at 8 cents a pound, carried at a loss of two million dollars a year.

Fourth-class: Merchandise at 16 cents a pound (one cent an ounce), carried at a profit of nearly three millions of dollars a year.

It is thus seen that for reasons of public policy, which seemed to it sufficient, Congress requires the individual to pay about eighty times as much per pound to get his letters carried as it requires a publisher to pay for sending newspapers through the mails. Books pay eight times as much as newspapers, and merchandise sixteen times as much.

In other words, every man, woman, and child who mails a letter is being overtaxed for the benefit of the publisher. The 90,000,000 of people are

[1] Postal Laws and Regulations (ed. 1902); Message of the President, of February 22, 1912, transmitting the Report of the Commission on Second-Class Mail Matter; addresses of James J. Britt, Third Assistant Postmaster General, March 5, 1911, at Jersey City, and June 14, 1911, at Chicago; Annual Report of Post Office Department for 1911.

being taxed directly for the benefit of 30,000 publishers.

The Government overcharges people who mail letters about $70,000,000 a year, and that profit all goes to make up the loss sustained by carrying periodicals, etc., at the low second-class rate.

We thus see that Congress has discriminated against the individual and in favor of the publisher. If it had the power to do so, can it not equally well make some changes in that classification? The publishers have no vested right in any particular classification. (*Haughton* v. *Payne*, 194 U. S. 88, 99.) There is nothing holy in the classification adopted in 1879. Congress can surely increase the second-class rate to two cents a pound, or limit the size or weight of periodicals carried therein. In short, Congress can affix such conditions as it chooses to the right to be admitted to the second-class rate.

Now, that is exactly what it has done by the statute now under consideration.

For more than thirty years Congress has said that newspapers should not be admitted to the second-class mail privilege at the low rate of one cent a pound unless such newspaper or periodical complied with the following conditions (Postal Laws, secs. 427, 428, 438, 440):

> (*a*) That it should be dated; serially numbered; issued regularly at least four times a year from a known office; unbound; have a legitimate list of subscribers; and not be primarily designed for advertising purposes.

(*b*) That it should file a sworn statement giving a lot of information as to its *proprietors; editors;* their *financial interest* in the trade represented by the publication; its *circulation,* etc.

(*c*) That it should print on each issue the words "Entered ------ at the post office at ------ as second-class matter," etc.

The present statute merely extends those requirements to a comparatively slight degree. It requires the names of the stockholders and bondholders to be furnished, and that twice a year the paper shall publish the same information (which for thirty years the law has required to be given to the Post Office Department), with the addition of the names of the stockholders and bondholders. It also adds the new requirement that paid-for matter shall be labelled "advertisement."

It is at once seen that the additional requirements are not revolutionary, and are nothing like as great an extension over the existing requirements as they in turn were over those previously in force.

The object of the foregoing discussion has been to direct attention very sharply to the fact that the very favorable privileges now enjoyed by the newspapers were the result of the exercise by Congress of its power of classification in their favor and against the public generally; and further, that the provisions of the statute now assailed are along the same line as the unquestioned provisions of thirty years' standing,

defining the conditions of admission to second-class privileges.

It must always be remembered that, construed as we have contended (p. 3, 4, *supra*), the statute does not attempt to regulate or censor the press, but merely adds to the existing law certain new conditions to which newspapers must conform in order to receive the benefit of the exceptionally favored rate of second-class postage, which is maintained by virtue of a tax on the people as a whole; and the people as a whole, acting through Congress, have prescribed the terms on which they will continue to extend such favored rate. The newspapers can comply and obtain the benefit or they can refuse to comply and use a less favored method of transmitting their papers. (*Noble State Bank & Haskell*, 219 U. S., 575, 580.) Or, what is probable, some will do one thing and others the other.

For more than thirty years Congress has said to the newspapers:

> "We have established the very low rate of postage of one cent a pound (free within the county of publication) for those publications which comply with certain conditions. If you satisfy the Postmaster General that you comply with those conditions, you may be allowed to use the mails at the low rate."

No one has ever questioned the power of Congress to attach such conditions, and thereby grant to newspapers a postal rate far lower than other persons could have for distributing books, circulars, manuscripts, etc.

Now Congress has simply added additional conditions to second-class mail matter, to wit, it says to the newspapers in effect:

> "If you desire to continue using the low rate we gave you years ago, you must have your paper show what articles are advertisements, the name of the editor, the extent of the circulation, etc. If you do not care to do that, you cannot have the low second class rates, for they are only established for those papers. You can use the mails, but not at those rates, for they do not apply to such character of papers as yours."

Has not Congress the same power to-day to say that to the newspapers as it had thirty years ago to say to the great book publishers:

> "You cannot send your books at one cent a pound because you do not comply with the conditions we have established for this specially favored mail matter." (*Houghton* v. *Payne*, 194 U. S. 88.)

No one doubted then the power of Congress to give to newspapers an advantage over book publishers or over private correspondence; and so now Congress merely limits that low rate to newspapers of a certain kind. No one has a vested right to use the mails at any given postage rate. (*Houghton* v. *Payne*, 194 U. S. 88, 99.) Congress has merely changed the rate. Newspapers that have had a cent a pound rate must now pay six cents; but they can obtain the one cent rate if they comply with the new requirements, just

as in 1879 they had to comply with certain new stipulations in order to get the special rate then established.

Suppose when the present second-class mail privilege was created in 1879 Congress had named as one of the conditions that the papers should publish semiannually their circulation, and the names of their owners, editors, publishers, etc., and mark all paid-for articles "advertisement." Surely no one would have said that there was anything in such conditions that rendered them more illegal than the conditions Congress actually imposed at the time. And if Congress could have imposed them when it *first created* second-class mail privileges, can it not equally well now add them as *additional* conditions?

In short, are not the requirements of the act in question merely elements going to define that class of mail matter which Congress says can be carried at one cent a pound? How can the press or any other class of our citizens claim to have a right to any particular postage rate or be admitted to a particular postal classification unless they conform to the rules by which such classification is created?

3. Having heretofore discussed the matter upon general principles, a consideration of the authorities will now be helpful.

In *Ex parte Jackson*, 96 U. S. 727, a Federal statute forbade the admission to the mails of any letter or circular concerning lotteries. The constitutionality of the statute was sustained upon the ground that

Congress had the right to say what should and what should not be admitted to the mails. The court said:

> The validity of legislation prescribing what should be carried * * * has never been questioned. * * *
>
> The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. * * *
>
> In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.

The court then quoted the statute against mailing obscene matter and continued (p. 736):

> All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles, and that any one who attempted to use it for that purpose should be punished. The same inhibition has been extended to circulars concerning lotteries—institutions which are supposed to have a demoralizing influence upon the people.

In *In re Rapier*, 143 U. S. 110, 133, the constitutionality of the antilottery act of 1890 was sustained. The act prohibited the transmission in the mails of any newspaper containing a lottery advertisement. The court adhered to its ruling in *Ex parte Jackson*—

> that the power vested in Congress to establish post-offices and post-roads embraced the regu-

> lation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden.

The court then said "that mail facilities are not required to be furnished for every purpose" because when the States surrendered to Congress the power to establish post offices and post roads "it was as a complete power," and that—

> it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

In *Public Clearing House* v. *Coyne*, 194 U. S. 497, the postmaster at Chicago stamped as "fraudulent" and returned to the senders all mail addressed to the plaintiff upon the ground that the plaintiff was using the mails to obtain money by false pretenses. In dismissing the plaintiff's bill for an injunction, this court said (p. 506):

> The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years the transmission of private letters was eithe

trusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high and the methods of transmission so slow and uncertain that it was not until 1845, when the postage was reduced to five and ten cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance it now possesses. * * *

The constitutional principles underlying the administration of the Post Office Department were discussed in the opinion of the court in *Ex parte Jackson*, 96 U. S. 727, in which we held that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded, and that in the enforcement of regulations a distinction was made between letters and sealed packages subject to letter postage, and such other packages as were open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, and that the constitutional guarantee against unreasonable searches and seizures extended to letters but did not extend to printed matter.

In establishing such system Congress may restrict its use to letters, and deny it to peri-

odicals; it may include periodicals, and exclude books; it may admit books to the mails and refuse to admit merchandise, or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service. It may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employes or injurious to other mail matter carried in the same packages. * * *

While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality.

For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitution-

> ality of this law we believe has never been attacked. The same provision was by the same act extended to letters and circulars connected with lotteries and gift enterprises, the constitutionality of which was upheld by this court in *In re Rapier*, 143 U. S. 110.

The rule to be extracted from the foregoing decisions is that the power of Congress over the postal system is plenary, and that it may in its own uncontrolled discretion say what shall be carried and what shall not be carried; and it may classify not only the recipients of mail matter, but also (1) the senders and (2) the mail sent, according to such rules as to it seem best.

If it be argued that Congress has no power to impose conditions concerning what shall be printed or omitted from printing in the papers mailed, except to exclude matter that it deems obscene, immoral, or otherwise injurious to the public welfare, and therefore can not exclude a paper because it does not disclose its editor or which of its articles are subsidized (those not being moral qualities), we reply that there is no distinction in the congressional power over things commonly called *mala in se* and those that are *mala prohibita;* and that when Congress says a particular form of printed matter is objectionable and can not go through the mails, it becomes as unmailable as the most obscene or immoral letter, *simply because Congress says so.* This court disposed of that very contention in *In re Rapier*, where, in response to that

precise argument by the late James C. Carter, it said (p. 134):

> The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offence of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, *since it would be for Congress to determine what are within and what without the rule;* but we think there is no room for such a distinction here, and that *it must be left to Congress* in the exercise of a sound discretion *to determine in what manner* it will exercise the power it undoubtedly possesses.

We submit, therefore, that Congress has the unrestrained power to say what in its opinion is so hurtful to the public welfare that it shall not pass through the mails; and it may enforce that opinion without its correctness being subject to judicial review. But it must be always remembered that in the case at bar, Congress has not undertaken to exclude the newspapers from the mails, but only to exclude them from the extraordinary privilege of cent-a-pound postage unless they conform to Congress' ideas as to publicity.

4. When, therefore, Congress declared that newspapers should be excluded from the second-class mail privileges unless they would *first* file with the Post Office Department and semiannually publish a statement giving the names of its editor, publisher, owner, etc., and, *second*, mark all paid-for articles "advertisement," it was only doing exactly what this court has said it may do, namely, exercising its "right to determine what shall be excluded" (*Ex parte Jackson*) and exercising its "sound discretion to determine in what manner it will exercise the power it undoubtedly possesses" (*In re Rapier*), and "refuse to include in its mails such printed matter as may seem objectionable to it upon the ground of public policy" (*Public Clearing House* v. *Coyne*).

No one has ever questioned the right of Congress to prescribe as a condition of admitting a newspaper to the second-class mail privileges that it shall file sworn statements telling (1) who are its editors and proprietors, (2) what interest, if any, they have in any business advertised therein, (3) whether the advertising columns are open to all (including competitors), (4) the number of copies printed, etc. (Postal Laws, sec. 438); and if Congress has all that power, surely it may increase its requirements to the extent embodied in the act under consideration.

A RESPONSE TO APPELLANTS' ARGUMENT THAT CONGRESS HAS NO POWER TO ENACT THE STATUTE IN QUESTION.

1. The entire argument submitted by appellants to show the lack of power in Congress to enact this statute is based upon what, we think, is an erroneous construction of the act.

For the purposes of argument we may concede appellants' contention that Congress has no express or implied power to require newspapers generally to furnish information as to ownership or to mark paid-for articles "advertisement," but such an argument is inapplicable, because the statute, properly construed, does not attempt to control newspapers as such, but it applies (1) only to newspapers desiring *to use an instrumentality* exclusively under the control of Congress pursuant to an express grant of power, and (2) only to the *extent of such use* of that Federal instrumentality, and (3) even then only to one limited and highly favored use thereof.

As Congress has the express power to establish postal facilities, it necessarily has the power (no matter whether you call it express or implied) to determine what shall be carried by the system it has created. Once admit that premise, and it follows that it may prescribe the *conditions* on which it will carry such articles. It surely may prescribe any conditions concerning the mail matter itself, whether as to size, weight, character of contents, purpose for which sent, etc., and it may likewise prescribe conditions concerning the person

In Mr. Beck's brief as finally printed, he has slightly changed this quotation, which we took from the advanced copy furnished us.

Answering his new brief as to whether Congress could deny a physician the use of the mails unless he filed a statement of his name, property, patients, etc., we reply that it is not necessary to decide that point, for such requirements do not bear any relation to the things mailed; but Congress might be able to say that no physician should deposit any printed matter in a particular class of mails unless such printed matter showed those very things. (See p. 38–40 of brief for U. S.).

depositing it in the mail, especially if the conditions attached to the sender bear some relation to the thing sent.

2. Appellants urge that Congress has no power to compel citizens to do things in themselves beyond the power of the Federal Government to compel, under penalty of a denial of some valuable privilege under the Constitution, such as the facilities of interstate commerce, citing the *Employers' Liability Cases*, 207 U. S. 463, 502, to the effect that merely because corporations are engaged in interstate commerce Congress has no right to regulate them or their business apart from such interstate business; and counsel add (brief of James M. Beck, pp. 19, 20):

> Is it a due regulation of the mails for the Federal Government to say to a citizen, "Unless you do certain things, which we have not otherwise the power to compel you to do, we will deny you the facilities of the mail"?
>
> Could Congress provide that every editor and publisher should vote the prohibition ticket, support the Suffragette cause and appropriate half of his publication to educational reading matter, under the penalty of exclusion from the mails? Could Congress provide that no religious institution could use the mails, unless it made a public statement of the value of the church property, its indebtedness and the names and addresses of its governing body?

We respond:

A. It is not necessary to decide whether Congress could exclude from the mails all articles sent by a

prohibitionist or a suffragette or religious institution, for, obviously, those conditions would have no possible relation either to the *articles* mailed or to the *use* of the mails. But Mr. Beck's illustration as to requiring half the publication to be educational reading matter was most unhappily chosen for the sake of his argument, as by the acts of July 16, 1894, and June 6, 1900 (Postal Laws, secs. 429, 430, 439), publications of certain societies and institutions of learning were required to be *wholly devoted* to such purposes, and State agricultural publications could contain nothing else, not even advertising matter, until the act of August 24, 1912, 37 Stat. 539, 551, changed the law. So we see that Congress *has for years* exacted one of the very conditions which Mr. Beck cites as an illegal condition.

Congress can attach the condition that half or the whole of the publication shall be devoted to educational reading matter, because that would be a condition attached to the *thing mailed;* and, indeed, the present second-class mail conditions are substantially that, to wit, that the *whole* publication shall be devoted to the dissemination of information of a public character, etc.

Here the conditions all relate to the condition of the *articles* mailed, to wit, they must have paid-for matter marked "advertisement," have the amount of circulation, and the names of the editors, owners, etc., printed twice a year in the *paper mailed;* while the only condition attached to the sender is the mere

filing, semiannually, of the required statement, which in turn must be published in the paper, so even the one condition attached to the sender has a direct and immediate relation to the thing mailed, as it is the necessary preliminary to getting the information which is to be printed in the thing mailed, and hence is entirely different from a requirement that the sender shall vote the prohibition ticket or support the suffragette cause.

B. For the purposes of argument we may concede his contention, but it is inapplicable. Congress does not say that it will exclude a person from the use of the mails unless such person will do something beyond its power to compel and having no relation to the use of the mails; but Congress only says that if certain *articles* are to be carried in the mails (or rather in one specially favored class of the mails) such *articles must possess certain characteristics* (*i. e.*, contain the label "advertisement" and twice a year the names of the owner, editor, etc.); and as these requirements apply to the *very things themselves* which are the direct object of action by an undoubted power of Congress, they relate directly and immediately to the subject over which Congress has plenary power, to wit, the transportation of articles by mail.

C. The ground of the decision in the *Employers' Liability Cases* was that while the statute was addressed to persons engaged in interstate commerce it was not confined to regulating the interstate commerce, which such persons may do, but undertook to regulate not the commerce, but the *persons;* and to

regulate not their actions in relation to commerce, but to regulate them in other respects simply *because* they engaged in such commerce.

To make the correct analogy it may well be that merely because a corporation uses the mails Congress has no power to regulate (for example) the insurance business such corporation is engaged in; but it may be quite competent for Congress to say that all *matter* transmitted by insurance companies in the mails should possess such and such qualifications or be excluded.

D. The fundamental fallacy which in one form or another underlies the entire argument of both appellants' briefs is the assumption that the act in question is a regulation of the private business of citizens in a manner beyond any express or implied power of Congress, and that it imposes as a penalty for disobedience a denial of an important Federal privilege which Congress controls. But counsel wholly overlook the controlling fact that the regulation complained of is *not* one which merely applies to the private business of the citizen disconnected from any relation to a Federal power, but is one which directly applies to the *very object* on which the Federal power directly operates, to wit, the *articles* carried by the Federal Government in its mails.

3. The appellants approach the subject with the premise that the purpose of giving to Congress the power to establish post offices and post roads was

simply to enable Congress to furnish mail facilities to carry whatever *the people* desired to transmit, and consequently any legislation that was not appropriate and plainly adapted to *that* end is void. But the vice in the argument is seen in the italicized words. Congress was to give facilities for carrying what *it* thought should be carried; not what the *people* thought should be carried. And, therefore, Congress has the absolute power to say what shall be carried by *its* instrumentalities.

Applying what Mr. Beck calls Chief Justice Marshall's "acid test," we insist that in determining *what* shall be carried in the mails (which is surely a legitimate end under the power to establish post offices and post roads), its requirements as to the *characteristics* of the articles to be so carried are appropriate means and plainly adapted to the end of determining *what* shall be carried. That being so, there can be no inquiry as to the nature of the characteristics which Congress affixes to the articles as conditions of their transportation.

4. Mr. Beck argues that by the act in question Congress assumes to exercise a power over the private affairs of people not granted by the Constitution. We reply that the power is not exerted upon the *people* (over which we concede it was *not* granted), but upon the *mails* over which it *was* granted.

Again, we insist that Congress is not attempting to do indirectly what it could not do directly; but

it *is* doing *directly* what it has the right to do, and it is immaterial that it may thereby indirectly accomplish something it could not do directly; for if some persons in order to obtain benefits under such direct action voluntarily choose to do things which Congress would be powerless to compel them to do, then that is a mere indirect result not affecting in any wise the exercise by Congress of its direct power.

In *McCray* v. *United States*, 195 U. S. 27, a Federal tax on oleomargarine was so heavy as to prohibit its manufacture within the States. As Congress would have no power to prohibit the manufacture of oleomargarine, the statute was attacked as unconstitutional upon the ground that Congress was using the taxing power to destroy something it had no right directly to prohibit. This court held the statute valid upon the ground that it could not go into the purpose or motive actuating Congress, but that as Congress had the power to tax, it could tax what it pleased and as heavily as it pleased.

So here, as Congress has the right to determine *what* shall be admitted to the mails, it can fix such conditions as it pleases, even though the practical necessities of the situation (resulting from competition among newspapers) are such that every newspaper will have to submit rather than surrender the low postage rate, and the *effect* may be for newspapers to make disclosures which Congress could not directly compel to be made.

THIRD POINT.

The statute is not a law "abridging the Freedom of the Press."

1. The late James C. Carter, in his briefs filed in *In re Rapier*, 143 U. S. 110, *France* v. *United States*, 164 U. S. 676, and *Francis* v. *United States*, 188 U. S. 375 (and Hannis Taylor in his brief in the *Rapier* case), thrice submitted an absorbingly interesting historical review and elaborate argument designed to show (1) exactly what the phrase "freedom of the press" imported at the time of the adoption of the First Amendment, and (2) that the anti-lottery statutes, in excluding from the mails newspapers containing lottery advertisements, abridged the freedom of the press by curtailing or diminishing the freedom of circulation of papers by mail, which was claimed to be the principal mode of circulation at the time the First Amendment was adopted.

Thrice this court rejected those arguments upon the ground that Congress could prescribe what should be carried in the mails and its exclusion of any particular matter was no interference with the freedom of the press. The historical review and arguments now presented by Mr. Beck (pp. 32–44) and Mr. Morris (pp. 29–41) are identical with Mr. Carter's argument and contain but one new suggestion, to which we will hereafter direct attention.

Mr. Carter contended that the "Freedom of the Press"—

> "imported that measure of liberty which permits, without previous restraint, the publica-

> tion of any writing whatever, and without the restraint of any subsequent penalty, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous." See p. 73 of brief in *Rapier* case and p. 48 of brief in *France* case.

This court thus disposed of his contention in the *Rapier* case (p. 134, 135):

> * * * Nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communications is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.

In *Patterson* v. *Colorado*, 205 U. S. 454, 462, this court said with reference to the constitutional prohibition against the abridgment of the freedom of the press:

> The main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be

deemed contrary to the public welfare. *Commonwealth* v. *Blanding*, 3 Pick, 304, 313, 314; *Respubica* v. *Oswald*, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth* v. *Blanding, ibi. sup.;* 4 Bl. Com. 150.

Conceding for the purposes of this argument that the freedom of the press imports just what Mr. Carter and Mr. Taylor contended for, it is a sufficient response to say that the present statute (construed as we have urged it should be) does not attempt to say what *shall or shall not be published*, nor to prohibit the *circulation* of newspapers; but it only declares that the specially low rate of one cent a pound shall apply only to such newspapers as comply with the required stipulations.

So construed, there is no limitation on the power of the press to publish what and how it pleases, and to circulate as it pleases, save that it can not have the second-class postal rate unless it conforms to the statute. But that is no more an abridgment of the Freedom of the Press than the statute requiring newspapers to have a legitimate list of subscribers and to be issued from a known office of publication, dated and serially numbered, etc.

Appellants attempt to distinguish the exclusion of lottery matter from the mails upon the ground that lotteries were immoral; and they concede that Con-

gress has the power to exclude matter injurious to the public health, morals, or safety. But in the *Rapier* case it was contended that lotteries, at the time of the adoption of the First Amendment, were not deemed immoral by the principles of what Mr. Beck now calls "axiomatic morality," and therefore Congress had no right to exclude them; and Mr. Carter evolved his theory of *mala in se* and *mala prohibita*, which this court summarily rejected. 143 U. S. 134; p. 34, *supra*.

Congress, from time to time, has the absolute right to determine for itself whether this or that matter is injurious to the public and therefore should be excluded from the mails or from some favored use thereof.

2. In so far as the argument for the Journal of Commerce proceeds upon the theory that the statute dictates to newspapers what they shall or shall not publish under penalty of a fine, there would be great force in it if the statute be given that construction; but construed as a mere condition of admission to the mails with a fine for using the mails without complying with the statute, the argument fails.

Again, in the brief for the Journal of Commerce (p. 39) it is suggested that if this act be upheld there will be nothing to prevent Congress from denying the use of the mails to (or fining) newspapers which are owned by individuals advocating certain political theories. A possible abuse of power is no argument against its existence, but we may as well observe that

a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal (p. 38–40, *supra*), as having no relation to the thing carried in the mails *unless the views are expressed in the paper;* but if such views *are expressed in the paper* Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff if a majority of Congress thought such views against public policy.

3. In one aspect the argument submitted by Mr. Beck takes a wider range than Mr. Carter's. In so far as he contends that the Freedom of the Press means the liberty of free discussion in print without previous restraint or subsequent penalty save as imposed by the law of libel, we may concede his point and reply that the statute properly construed does not impose either previous restraint upon or penalty for publishing anything, nor does it interfere with the *circulation after printing*, save only in the one mode of second-class mail.

But he goes further and argues that the Constitution protects the press from any restriction upon its rights or impairment of its influence; and that the press does not have the same full, free, and unimpaired right to print and circulate as it had before the law was passed. But he "begs the question," for what are its "rights" and what is meant by "impairing its influence"? If the rate of postage were raised or the size of the newspaper limited it

would not have the same full, free, and unimpaired rights that it had before, and yet no one would say its freedom had been abridged.

Mr. Beck argues (1) that a compulsory disclosure of circulation will impair the value of small newspapers as advertising agencies, and thus injure them financially; (2) that the disclosure of editorial identity abridges the right to disseminate ideas impersonally as "Junius," "Publius," etc., did; and (3) that the requirement of marking subsidized articles "advertisement" does not leave the press as free as it was before.

In reply, we can only repeat our former argument that such requirements, standing alone and emanating as a regulation by Congress upon the press, may well be unconstitutional, but when such results are not imposed absolutely but only as conditions to the exercise of a privilege wholly under congressional control, Congress may annex such terms as it desires as conditions to the use of its privileges.

Unquestionably, Congress, through the control over the mails, can as a price for using them compel a certain acquiescence in its views which the paper may prefer to pay rather than lose the use of the low postage rate; but even so, that is no abridgment of the full and free right to print and circulate anything the paper pleases, for there are many ways of circulation other than the one-cent-a-pound second-class rate.

FOURTH POINT.

The statute does not deprive appellants of either liberty or property without due process of law, nor does it take private property for public use without just compensation.

1. The requirement that the statement as to editors, owners, publishers, bondholders, circulation, etc., shall be published semiannually is not, as appellants argue, an appropriation of valuable private property (*i. e.*, advertising space in a newspaper, with the attendant cost of typesetting, printing, etc.) for public use without compensation, but it is merely a requirement as to what the paper must contain in order to receive the low postage rate. It is not compulsory but optional with the paper whether it will do so or not. If it refuses, it simply does not come within the class entitled to the lowest postage rate. If it complies, it receives its compensation a thousandfold in the almost nominal rate it pays for transmitting its papers. The present law requires each issue of a paper to print "Entered as second-class matter," etc. The new requirement is but a trifle more burdensome.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, involving the Oklahoma Bank Guaranty law, this court said:

> Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation.

There is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use. *Clark* v. *Nash*, 198 U. S. 361. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. *Offield* v. *New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372. *Bacon* v. *Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190.

It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

In short, where the Oklahoma legislature declares by implication that free banking is a

> public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards, this court certainly can not say that it is wrong.

And upon a petition for rehearing this court said (219 U. S. 580):

> *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, etc., were cited to establish, not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private.

2. The same considerations demonstrate that there is no deprivation of liberty or property without due process of law, for the act does not require the things done but makes them mere optional conditions to the exercise of a right which Congress has absolute power to grant or refuse with or without conditions. The statute does not compel the citizen to disclose his private affairs nor to publish them to the world. It merely says that he must make certain disclosures if he desires to use a special privilege, leaving it optional with him to do it or not.

In *Noble State Bank* v. *Haskell*, 219 U. S. 575, 580, it is said:

> For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the State.

3. It is argued that as publishers are singled out from all other citizens and required to make these disclosures, there is an arbitrary discrimination violative of fundamental constitutional rights. It is sufficient to say that the same principles which support the right of Congress to classify publishers so as to grant them a cent a pound rate (while other persons pay many times that on their articles), will support the right to say that those using that classified low rate, must, in consideration therefor comply with the statute.

If it is legal to give newspapers a rate of postage lower than other persons pay, then no objection can be fairly made, because as a condition of such a low rate the same favored class have special burdens imposed as conditions to the exercise of such right.

FIFTH POINT.

A court of equity will not, by injunction, restrain the prosecution of criminal proceedings.

In so far as the Journal of Commerce seeks to enjoin the Attorney General and the United States district attorney from instituting criminal proceedings to enforce the fine for sending paid-for articles through the mails without marking them "advertisement," it is clear that a court of equity has no jurisdiction to entertain a bill of that kind. *In re Sawyer*, 124 U. S. 200, 210–211, and cases cited; *Harkrader* v. *Wadley*, 172 U. S. 148, 170; *Fitts* v. *McGhee*, 172 U. S. 516, 531–533; *Hemsley* v. *Myers*, 45 Fed. 283; *Wagner* v. *Drake*, 31 Fed. 849; *Logan* v. *Postal Tele-*

graph Co., 157 Fed. 570; 2 Story Eq. Jur., sec. 893; High on Injunctions, 4th ed., sec. 68; Joyce on Injunctions, secs. 58–60a.

The present case, involving merely small fines, does not fall within any of the exceptions to the rule, such as where the penalty would amount to confiscation, etc.; and the bill was rightfully dismissed, without regard to the constitutionality of that feature of the statute.

The Morning Telegraph, in its bill, does not seek to enjoin any criminal proceedings, but apparently construes the statute to deny the use of the mails for a failure to mark such articles "advertisement." Therefore, it presents a proper case for the consideration of the validity of the act.

SIXTH POINT.

If the "advertisement" paragraph should be held void, it should not affect the validity of the balance of the statute.

In the event that the court should not adopt our construction that compliance with the "advertisement" paragraph was a mere condition to the use of the mails, and should declare it unconstitutional as (1) a direct abridgment of the freedom of the press, or (2) an exercise of a power nowhere given to Congress, then the balance of the section is clearly separable and can stand alone.

The constitutional part of a statute partially unconstitutional will be enforced where the parts are so distinctly separable that each can stand alone and

where the court is able to see and to declare that the intention of the legislature was that the part pronounced valid should be enforceable even though the other part should fail. *Bank of Hamilton* v. *Dudley*, 2 Pet. 492, 526; *Field* v. *Clark*, 143 U. S. 649, 695–697; *Income Tax Cases*, 158 U. S. 601, 635–636; *Trade-Mark Cases*, 100 U. S. 82, 98–99; *Baldwin* v. *Franks*, 120 U. S. 678, 687–688; *Poindexter* v. *Greenhow*, 114 U. S. 270, 304–305; *Employers' Liability Cases*, 207 U. S. 463, 501; *Packet Co.* v. *Keokuk*, 95 U. S. 80, 89; *Presser* v. *Illinois*, 116 U. S. 252.

CONCLUSION.

The decrees below should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

26 NOVEMBER, 1912, *Washington, D. C.*

O

Supreme Court of the United States.

THE JOURNAL OF COMMERCE & COMMERCIAL BULLETIN,
Appellant,
against
FRANK H. HITCHCOCK, as Postmaster General of the United States of America, GEORGE W. WICKERSHAM, as Attorney General of the United States of America, EDWARD M. MORGAN, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and HENRY A. WISE, as District Attorney of the United States, in and for the Southern District of New York,
Appellees.

No. 913.
October Term, 1912.

MOTION BY APPELLANT FOR RESTRAINING ORDER.

ROBERT C. MORRIS,
Of Counsel for Appellant.

C. H. Dunscomb, 30 to 38 Spring Street, New York.

Supreme Court of the United States.

THE JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN,
Appellant,

AGAINST

FRANK H. HITCHCOCK, as Postmaster General of the United States of America, GEORGE W. WICKERSHAM, as Attorney General of the United States of America, EDWARD M. MORGAN, as Postmaster of the United States of America, in and for New York City, Borough of Manhattan Post Office, and HENRY A. WISE, as District Attorney of the United States, in and for the Southern District of New York,
Appellees.

No. 818.
October Term, 1912.

The petition of The Journal of Commerce and Commercial Bulletin, the appellant above named, respectfully shows to this Court :

That this action, commenced by the filing of the complainant's bill in the District Court of the United States, for the Southern District of New York, on the 9th day of October, 1912, was brought to restrain the defendants from enforcing certain provisions of Section 2 of the Postal Appropriations Act of August 24th, 1912, which in substance provides that the owner of a newspaper or other publication shall file with the government and publish in such newspaper twice each year a sworn statement showing, among other things, the names of its known bondholders, mortgagees and other security holders, and if a corporation, the names and addresses of its stockholders; that daily newspapers shall include in the statement filed and published

the average number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months, the penalty for non-compliance being a denial of the privileges of the mail; and which further provided that all editorial or other reading matter published in such newspaper, magazine or periodical, for which money or other valuable consideration is paid, accepted or promised shall be plainly marked "advertisement," under penalty of a fine of not less than $50 nor more than $500.

Immediately upon the enactment of said statute it was seen that the provisions above referred to would work irreparable injury to the complainant and many thousands of newspapers scattered throughout the entire United States, and counsel for the complainant, representing the complainant and the members of the American Newspaper Publishers Association, conferred with the Department of Justice and the then Attorney General, Honorable George W. Wickersham, and with the Post Office Department and the then Postmaster General, Honorable Frank H. Hitchcock, with a view to the commencement of an appropriate action wherein the constitutionality of the aforesaid provisions of said Act of August 24th, 1912 could be determined expeditiously and whereby an understanding could be reached as to the enforcement of such provisions, pending the final determination of such contemplated action.

That counsel herein for the complainant commenced this action and the defendants for the purpose of facilitating the action voluntarily appeared herein. That thereafter a decree was entered herein in said District Court of the United States, for the Southern District of New York on the 15th day of October, 1912, sustaining the demurrer of the defendants and dismissing the bill, whereupon the appellant perfected its appeal to this Court and filed the record on appeal with the Clerk of this Court on October 17th, 1912.

That on the 21st day of October, 1912, a motion to advance said appeal for argument was made to this Court in which motion the Solicitor General of the United States concurred, and thereafter such motion was granted and this appeal set for argument and thereafter duly argued on the 2nd and 3rd days of December, 1912.

That at the time of the taking of said appeal and during

the proceedings aforesaid, it was agreed between counsel for the appellant, the Department of Justice and the Post-Office Department that pending the decision by this Court upon said appeal in this case no action would be taken by the Post-Office Department to either compel the appellant or other newspaper publishers throughout the country to comply with the aforesaid provisions of said Act of August 24th, 1912, or to enforce against them the penalties for non-compliance or to deny to them the privileges of the mail upon their failure to file and publish the required statements. That the only condition attached to such understanding was the condition that counsel for the appellant should prosecute this appeal with all reasonable diligence, so that the questions involved might be presented to this Court for determination without undue delay.

That in consideration of the making of said agreement and at the request of the Department of Justice counsel for the appellant refrained from applying to the District Court of the United States, for the Southern District of New York, for a temporary injunction restraining the defendants from enforcing said statute until the final determination of the action and entered into an arrangement with the Department of Justice whereby to expedite a final decision in this case, no application for an injunction was made, but a *pro forma* decree was entered upon the defendants' demurrer dismissing the bill of the appellant.

That notwithstanding the agreement so made for the non-enforcement of said statute pending the decision of this Court, appellant, on the 5th day of March, 1913, received, as publisher of The Journal of Commerce and Commercial Bulletin and as publisher of The Review, from the defendant Morgan, two letters in the following form:

"POST OFFICE, NEW YORK, N. Y.
"Office of the Postmaster

"MARCH 4, 1913.

"PUBLISHER,
"'Journal of Commerce and
"Commercial Bulletin'

"DEAR SIR:

"As no statement of the ownership, management, "etc., of your publication for October 1, 1912, has been

" filed as required by the Act of August 24, 1912,
" you are hereby notified by direction of the
" Third Assistant Postmaster General that *unless such*
" *statement is filed at once*, setting forth the matters
" required to be reported on October 1, 1912, the
" registered notice contemplated by the following pro-
" vision of the Act will be given by the Department:

" ' Any such publication shall be denied the priv-
" ' ileges of the mail if it shall fail to comply with
" ' the provisions of this paragraph within ten days
" ' after notice by registered letter of such failure.'

" Two copies of Form 3526 for the sworn statement
" referred to have already been furnished to you, but
" if it is your intention to file the statement and addi-
" tional forms are desired for this purpose they may
" be obtained at Room 4, General Post Office.

" The statement must be made in duplicate and
" both copies should be sent to Room 4, General Post
" Office, without delay, as prompt report will be made
" to the Department of any publisher failing to file this
" return.

" Very respectfully,
" EDWARD M. MORGAN,
" Postmaster."

That similar letters were also sent by the Post Office Department to and received by all other newspaper publishers throughout the country who had not complied with said Act of August 24th, 1912.

That immediately after the receipt by appellant of such notice counsel for appellant conferred with the Third Assistant Postmaster General, Honorable James J. Britt, with the present Postmaster General of the United States, Honorable Albert S. Burleson, and with Honorable William Marshall Bullitt, the Solicitor General.

That the agreement and understanding with respect to the non-enforcement of the statute as above recited was recognized by Mr. Bullitt and by Mr. Britt, but that Mr. Britt and Mr. Burleson have refused to further abide thereby and have given verbal notice to counsel for appellant that they intend to fully enforce said statute and that, unless the required statements

are filed by appellant and other newspaper publishers on or before the 11th day of March, 1913, they will cause to be sent to each such publisher neglecting to file such statement, the notice by registered mail contemplated by said statute and set forth in the afore-recited letter; and that thereafter at the expiration of the ten days from the receipt of such registered notice will deny to all newspaper publishers, including appellant, the privileges of the mail if at that time the required statements have not been filed with the Post Office Department and published.

That if the defendants and their successors in office be permitted to proceed as they are now threatening and about to do the appellant and thousands of other newspaper publishers similarly situated will be denied the privileges of the mail and will be irreparably injured unless they comply with the provisions of said statute and in either event will be prevented from receiving the benefits of the decision of this Court should this Court determine said statute in all or any of its provisions to be unconstitutional and invalid.

That appellant has brought this action in good faith and has prosecuted this appeal with all due diligence, and appellant believes it unfair that at this time it should be put in a position where it will be deprived of the benefits thereof if this Court should subsequently sustain its contention that said statute is unconstitutional and invalid. That appellant in good faith and at the suggestion of the defendants adopted the procedure had in this case and in reliance upon the agreement with the defendants and at their request waived its right to apply for an injunction to prevent the enforcement of the Act and having so relied upon the understandings had with the defendants now believes that it should not be made to suffer for matters beyond its control nor deprived of the benefits that this action may ultimately afford it.

The Solicitor General of the United States has accepted service of this motion.

WHEREFORE appellant respectfully prays this Court to grant herein an order restraining the defendants or their successors in office, as the case may be, and all persons acting through or under them, until the decision of this Court herein

from enforcing or attempting to enforce the provisions of said statute, and particularly restraining them from denying to appellant and other newspaper publishers the privileges of the mail by reason of the failure or neglect of appellant and such other publishers to comply with the provisions of said law and file the statements required thereby.

Dated, New York, March 10th, 1913.

ROBERT C. MORRIS,
Of Counsel for Appellant.

JOURNAL OF COMMERCE AND COMMERCIAL BULLETIN *v.* BURLESON, AS POSTMASTER GENERAL OF THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 818. Submitted March 11, 1913.—Decided March 17, 1913.

A restraining order against the Postmaster General enforcing the statute, the constitutionality of which is involved in this action (see *ante*, p. 288) granted pending the decision on application of the appellant.

PETITION of The Journal of Commerce and Commercial Bulletin for restraining order.

Mr. Robert C. Morris for petitioner:

The petition alleged among things that at the time of taking the appeal and during the proceedings, it was agreed between counsel for the appellant, the Department of Justice and the Post-Office Department that pending the decision by this court upon said appeal in this case no action would be taken by the Post-Office Department to either compel the appellant or other newspaper publishers throughout the country to comply with the provisions of the act of August 24, 1912, or to enforce against them the penalties for non-compliance or to deny to them the privileges of the mail upon their failure to file and publish the required statements. That the only condition attached to such understanding was the condition that counsel for the appellant should prosecute this appeal with all reasonable diligence, so that the questions involved might be presented to this court for determination without undue delay.

That notwithstanding the agreement, appellant had re-

ceived from the Postmaster of New York a communication to the effect that the provisions of said statute would be enforced forthwith without awaiting the decision of this court on the appeal which had been argued on December 2 and 3, 1912, and had not yet been decided.

That The Solicitor General of the United States had accepted service of the motion.

The appellant prayed the court to grant herein an order restraining the defendants or their successors in office, as the case may be, and all persons acting through or under them, until the decision of this court herein, from enforcing or attempting to enforce the provisions of said statute, and particularly restraining them from denying to appellant and other newspaper publishers the privileges of the mail by reason of the failure or neglect of appellant and such other publishers to comply with the provisions of said law and file the statements required thereby.

PER CURIAM. On consideration of the motion for a restraining order of the appellees herein,

It is now here ordered by the court that the motion be, and the same is hereby, granted.